TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 231

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
PETITIONER,

vs.

NORTHSIDE BELT RAILWAY COMPANY

IN WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1927.

CERTIORARI GRANTED MAY 2, 1927.

(32,654)

(32,654)

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[fols. a-c] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, AT HOUSTON

No. 247. Equity

TEXAS & NEW ORLEANS RAILROAD COMPANY

versus

NORTH SIDE BELT RAILWAY COMPANY ET AL.

WAIVER OF PRÆCIPE AND STIPULATION AS TO TRANSCRIPT OF RECORD—Filed October 6, 1925

All parties to the above styled and numbered suit by and through their respective counsel, hereby waive the issuance of præcipe and agree that the following list of documents are to constitute the record of appeal, which record is to embrace said documents in the order named:

1. Plaintiff's Original or amended original bill of complaint.

2. Stipulation as to plaintiff's exhibits and amendments.

3. Defendant's amended or original answer.

[fol. 2] 4. Final Decree.

5. Opinion of the Court.

6. Application of restraining order pending appeal.

7. Judgment of the Court refusing restraining order.

8. Petition for appeal and Court's order thereon.

9. Assignments of error, and supplemental assignment of error.

10. Appeal Bond.

11. Waiver of Præcipe and stipulation as to documents which are to constitute the record on appeal.

12. Waiver of Citation on Appeal.

13. Statement of facts and exhibits attached thereto.

14. Certificate of the Clerk.

Nelson Phillips, W. W. Moore & J. Y. Powell, Attys. for Northside Belt Ry. Co., and Baker, Botts, Parker & Garwood, Garrison & Watson, Attorneys for the Texas & New Orleans Railroad Company.

[fol. 3] [Caption omitted]

IN UNITED STATES DISTRICT COURT

BILL FOR INJUNCTION—Filed June 13th, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

Comes now Texas & New Orleans Railroad Company, hereinafter styled "Complainant," and complaining against and suing Northside Belt Railway Company, hereinafter styled "Respondent," and represents and shows to the Court:

[fol. 4] I

That complainant is a corporation created, organized and existing under and by virtue of the laws of the State of Texas and has its domicile in the City of Houston, Harris County, in the Southern District of the State of Texas, and that respondent is also a corporation created, organized and existing under and by virtue of the laws of said State of Texas, having its domicile in said City of Houston, Harris County, in the Southern District of said State.

II

That respondent was created and exists for the purpose of constructing, owning, maintaining and operating a terminal railway and has and possesses the right to exercise all of the rights, powers and privileges conferred by Subdivision 53 of Article 1121 of the Revised Statutes of Texas, which said Subdivision of said Article is as follows, to-wit:

"The construction, operation and maintenance of terminal railways; and any such terminal railway company, in addition to the rights conferred by law upon corporations generally, shall have and exercise all rights and powers conferred upon railroad companies by Chapters 8 and 9, Title 115 of the Revised Statutes of Texas, relating to railroads. And when any such terminal railway company is adjacent to any inland navigable stream or water body, it shall have the right and power to construct, erect, operate and maintain all necessary and convenient facilities of every kind and character to accommodate and expeditiously handle the exchange of freight and passenger traffic with any and all steamships, and all other vessels and water [fol. 5] craft using such waterways. Such terminal railway company shall also have the right to issue bonds in excess of its authorized capital stock; provided, that its stock and bonds shall be issued under the direction of the Railroad Commission of this State, in accordance with the stock and bond law regulating the issuance of stocks and bonds by railroads; and the commission shall fix the values of the property, rights and franchises of such terminal railway company; and its stock and bonds shall not exceed the amount authorized by the Railroad Commission of Texas; and jurisdiction over the issuance of the bonds herein authorized is hereby expressly vested in the Railroad Commission; provided, that no such terminal company shall have the right to charge any railroad company, steamship, vessel or water craft for terminal facilities a greater amount than may be, from time to time, designated and established by the Railroad Commission, which shall have authority to establish and prescribe such rates and rules for the operation of all such terminal companies as will prevent discrimination by them against any common carrier with respect to either charges or service; provided, further that the provisions of Articles 6656, 6657 and 6658 of the Revised Statutes of Texas shall apply to any and all orders, rulings, judgments and decrees of the Railroad Commission made, entered or held under the provisions of this subdivision in regard to such terminal railway companies."

III

That said respondent is a common carrier by railroad, subject to the Interstate Commerce Act enacted by the Senate and House *and* Representatives of the United States on February 4, 1887, and thereafter from time to time [fol. 6] amended, and is further a common carrier by railroad, subject to the terms and provisions of the Transportation Act of 1920, enacted by the Senate and House of Representatives of the United States on February 28, 1920.

IV

That said respondent has projected and is constructing or about to construct a certain main line of railway wholly within the State of Texas, beginning at the northwest corner of the American Petroleum Company's terminal property; thence to extend in a westerly direction to intersect with the Municipal and Harbor Belt Railroad in the northeastern part of the City of Houston, a distance of approximately five (5) miles, all within the County of Harris and said State, and said respondent has instituted or caused to be instituted a certain condemnation suit in the County Court at Law of Harris County, Texas, against complainant for the purpose of condemning and acquiring a right of way of one hundred feet (100') in width and of a length of eleven hundred and twenty-seven feet (1127), comprising an area of two and 587/1000 (2.587) acres of land, belonging to complainant and being a part of the Ezekial Thomas League in said Harris County, Texas, and is threatening to go upon and is about to go upon the said lands of said complainant and construct thereon an embankment and a railroad track, or tracks all to complainant's damage exceeding the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

V

That the said respondent is about to extend, construct and operate said line of railroad and to engage in trans- [fol. 7] portation under the said Interstate Commerce Act and said Transportation Act of 1920 by means of such line of railroad without having obtained from the Interstate

Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of said line of railroad; that the said respondent has never applied to said Interstate Commerce Commission for any such certificate and has never obtained from said Interstate Commerce Commission any such certificate, nor has the Interstate Commerce Commission ever issued any certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of said line of railroad, and complainant, upon information and belief, alleges the fact to be that neither the present nor future public convenience or necessity require or will require the same; that the said line of railroad is not a spur, industrial, team, swtiching or side track, or a street, suburban or interurban electric railway within the meaning of Subdivision 22 of Section 1 of said Interstate Commerce Act as amended, but is a terminal railway for the transportation of freight as a common carrier for the public.

VI

That this is a suit which arises under the Constitution and Laws of the United States and complainant herein is a party in interest, to-wit: the owner of a tract of land sought to be condemned and crossed by the said respondent in the construction and operation of the terminal railroad aforesaid, and unless the said respondent shall be enjoined and restrained from prosecuting the said condemnation [fol. 8] suit and from constructing, maintaining and operating the said line of terminal railway upon and across complainant's property, which it requires for its own corporate purposes, the said complainant will suffer great and irreparable damage, for which it has no remedy at law.

Premises considered, complainant prays that upon hearing hereof this Honorable Court issue its most gracious writ of injunction, enjoining and restraining the respondent herein, its attorneys, officers, agents, servants and employees, from prosecuting the said condemnation suit and from constructing, maintaining or operating the terminal railroad aforesaid upon or across the property of the complainant herein.

And complainant further shows to the Court that the said respondent is now actively preparing to press the said condemnation suit to trial and to construct, maintain and operate the said terminal railroad upon and across the complainant's property and, unless immediately restrained and prevented therefrom by a restraining order issued by this Honorable Court, will accomplish it [its]—said purpose before this cause or complainant's application for an injunction can be set down and heard.

Wherefore, complainant prays the Court that it forthwith enter its temporary restraining order restraining the said respondent until further hearing hereof from doing any of the things herein sought to be enjoined.

Baker, Botts, Parker & Garwood, Garrison & Watson, Attorneys for Complainant.

[fol. 9] *Duly sworn to by G. S. Waid. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO ORIGINAL EXHIBITS AND ORDER THEREON—Filed October 6th, 1925

All parties to the above styled and numbered cause, by and through their respective counsel, hereby agree that all [fol. 10] of the original maps introduced in evidence may be sent up as a part of the record in this cause.

Garrison & Watson, Baker, Botts, Parker & Garwood, Attorneys for Texas & New Orleans Railroad Company. Nelson Phillips, W. W. Moore & J. Y. Powell, Attorneys for North Side Belt Railway Company.

Upon consideration of the foregoing agreement, the Clerk is directed to send with the Transcript of Record in this case, all Original Maps introduced in evidence on the trial of this case.

J. C. Hutcheson, Jr., Judge United States District Court.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 11, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

Northside Belt Railway Company, Respondent in the above styled and numbered cause, for answer therein represents to the Court:

I

Respondent admits the allegations contained in paragraph I of the Bill of Complaint.

[fol. 11]

II

Answering paragraph II of the Bill of Complaint, Respondent admits that it is incorporated under and by virtue of the general laws of the State of Texas, by charter filed in the office of the Secretary of State of Texas on March 31st, 1925, having corporate powers and purposes of constructing, owning, maintaining and operating a terminal railway wholly within the County of Harris in the State of Texas, extending from a point near the northwest corner of American Petroleum Company's property, in a westerly direction a distance of about five miles to a connection with the Municipal and Harbor Belt Railroad in the northeastern part of the City of Houston; and that as such corporation it has the right under laws of Texas to condemn property of others for its use as a right-of-way for its said line of railroad.

III

Respondent denies the allegations contained in paragraph III of the Bill of Complaint and alleges that it is wholly and solely an intra-state railroad Company within the State of Texas.

IV

Respondent denies all of the allegations contained in paragraph IV, of the Bill of Complaint, except as may be hereinafter admitted; and further answering said paragraph, Respondent alleges that as such corporation aforesaid, and acting under authority of the State of Texas, it

proposes to construct and is engaged in the construction of the line of intra-state railroad before described, in the course of which it became expedient and necessary to cross [fol. 12] certain property of complainant in Harris County, Texas; that upon permission therefor, being refused by Complainant, Respondent proceeded to and did institute condemnation proceedings therefor in the County Court at Law of Harris County, Texas, in due accordance with the law pertaining thereto, for the purpose of condemning and acquiring for its corporate use a right-of-way one hundred (100) feet in width and eleven hundred twenty-seven (1127) feet long, comprising an area of two and five hundred eighty-seven thousandths (2.587) acres of land then belonging to complainant and being a part of the Ezekial Thomas League in Harris County, Texas; that such condemnation proceedings were prosecuted and resulted in due course in said right-of way being duly condemned and awarded to Respondent in accordance with the law, on the 13th day of June, 1925; that Respondent having condemned said right-of-way and having procured an award by appraisers appointed by the Court, thereupon deposited the requisite sum of money to guarantee Complainant's damage as provided by law, and also executed and filed bond in the terms of the law, which was duly approved. Thereupon Respondent became entitled to the possession and use of said property. That all of these proceedings were had before the filing of this suit. Thereupon, being entitled under the law to take possession of said right-of-way, Respondent did take possession of same and has since remained in that possession; and being unrestrained by any order or writ of this Court, it constructed its track along and over said right-of-way prior even to the service upon it of this Court's order to herein show cause why an injunction should not issue, which track and line of railroad authorized by Respondent's corporate charter is now extant on and across Complainant's said land, by due authority of the laws of the [fol. 13] State of Texas; wherefore, the question and issue raised by Complainant's Bill of Complaint have become moot and present no ground for the equitable relief herein sought by Complainant.

V

Respondent denies all and singular the allegations of paragraph V of the Bill of Complaint—except as may be hereinafter admitted; and alleges that the connection with any other railroad which it contemplates making and expects to make is with the Municipal and Harbor Belt Railroad, a railroad and carrier owned by and chiefly within the City of Houston, Texas, and which is not engaged in interstate commerce and is not under the supervision or regulation of the Interstate Commerce Commission, and is not by law subject to its supervision or regulation; that Respondent has not and is not in any way engaged in transportation of commodities in interstate commerce or otherwise as a common carrier. Respondent alleges, by reason of the premises, that neither it nor its line of railroad and business operations are governed and controlled by said Interstate Commerce Act, as amended, or by said Transportation Act of 1920, nor are they subject to the jurisdiction of the Interstate Commerce Commission.

VI

Respondent denies all and singular the allegations of paragraph VI of the Bill of Complaint, and alleges that this suit does not arise under the constitution and laws of the United States for the reasons, as stated in the preceding paragraphs hereof, that Respondent and its line of railroad and its operations are not within the terms of and are [fol. 14] not governed and controlled by the Federal Interstate Commerce Act or by the Transportation Act of 1920. Respondent further alleges that if said Federal Interstate Commerce Act or said Transportation Act of 1920, be held to apply to Respondent and its properties and its operations pursuant to its charter powers, they and each of them, exceed the powers which under the Constitution of the United States are conferred on and can be exercised by Congress and are unconstitutional and void.

VII

Wherefore, Respondent having fully answered herein prays that Complainant's Bill of Complaint be dismissed and that Respondent be hence dismissed with its costs.

Nelson Phillips, W. W. Moore, Beeman Strong, J. Y. Powell, Solicitors for Respondent Northside Belt Railway Company.

Duly sworn to by W. H. Mead. Jurat omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

OPINION—Filed September 26, 1925

This is an action, brought by the Texas & New Orleans Railroad Company, a party at interest, to enjoin the North Side Belt Railway Company from constructing its railroad on the North side of the Houston Ship Channel.

The record consists mainly of an agreed statement of facts together with the testimony of Mr. Cullinan, President of the defendant railroad, the effect of which agreed statement and testimony is that the Northside Belt Railway Company chartered under the laws of Texas for the purpose of "constructing, owning, maintaining and operating a terminal railway" the main line of which should be constructed 'commencing at' the Northwest corner of the American Petroleum Company's terminal property then extend in a westerly direction where the proposed line would intersect the Municipal & Harbor Belt Railroad a distance of approximately five miles and located wholly within Harris County, Texas."

[fol. 16] That the Northside Belt Terminal Railway Company has never procured a permit from the Interstate Commerce Commission for the construction of its road. That the proposed line will connect with the private spur track of the American Petroleum Company which spur track serves its terminal located on the Houston Ship Channel. That the Municipal & Harbor Belt Railroad with which it will also connect, was built by and is owned by the City of Houston and handles both interstate and intrastate freight

connecting with the other main lines of the different roads, entering the port. That this Belt Railroad is operated by a joint association composed of various main line rail roads entering Houston. That during the month of June, 1925, fifty per cent of the freight handled from twelve of the most important industries situated along the channel was interstate freight.

That on or about the 8th day of June, 1925, the respondents duly filed this proceeding for the purpose of condemning a right of way across the land of the complainant. That such proceedings were duly prosecuted resulting in an award to the complainant of $750. That following the condemnation proceedings respondent took possession of the land in question on the 13th day of June, 1925, and laid a track across it and is now in possession of same.

That immediately after the condemnation proceedings were completed, construction of the railroad was commenced across complainant's property and was completed at about 11 o'clock P. M. on the date of the condemnation proceedings.

Mr. Cullinan testified that when the road was completed it was intended to be operated. That he is interested in the Galena Signal Oil Company and the American Petroleum Company. That those companies are both engaged in [fol. 17] the shipping and exporting of oil from points outside the state of Texas, and that they have private industrial tracks of their own. That the complainant serves the Galena Signal Oil Company and through it the American Petroleum Company. That this Northside Belt Railroad was being built to give facilities which were needed there and which ought to have been earlier built, and which the witness and those associated with him were undertaking to do because others had failed to do. That it was intended to make the industrial tracks owned by the American Petroleum Company a part of the Northside Belt Railway and when the work was completed to have a complete connection through the Northside Belt Railway with the Municipal Belt for those plants.

That when the Northside Belt Railway was finished they expected it to be operated as a terminal railroad, with all the rights and powers which its charter gave it. That the T. & N. O. is the only railroad that operates a line down to

the western terminus of the Galena Signal and when the Northside Belt was finished it would give these properties a connection with the Municipal Harbor Railroad.

Whether the injunction prayed for should issue or not turns upon the single question whether the Transportation Act of 1920 invoked by complainant, applies to the construction by a new railroad corporation, of a physical railroad track before it becomes engaged or offers to engage in the actual transportation of interstate freight and passengers.

Respondent contends that Sections 18 to 22 of the Transportation Act do not apply to the construction of a newly constructed road, but only apply to common carriers engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920, or to new carriers when [fol. 18] and after they become impressed with an interstate character, while upon the part of complainant it is contended that a new railroad cannot construct a new line of railroad wholly interstate.

In other words, that the Act gives to the Commission jurisdiction over any railroad construction, although entirely intrastate and wholly incapable of doing an interstate business until its road has been completed.

Apart from the plain language of the Act, which I think is in accord with defendant's contention that it only relates to carriers engaged in interstate commerce, I think it plain that every principle of constitutional and statutory construction denies the Act the effect contended for by complainant.

It must be admitted that the Act is far reaching in its intendment and that insofar as it gives jurisdiction over railroad construction by wholly intrastate railroads actually engaged in interstate commerce, it is more imperial than even the strictest Federalist of the early days in their fondest hopes ever dared forecast.

Well shotted as this new arm of interstate commerce is, however, it has not been and cannot be drawn to so fine a bead as to bring within its comprehensive aim the fledgling railroad in the case at bar, for however exclusive the power of Congress over interstate commerce and however free from interference by states such commerce is, state laws touching and state contacts with actual physical properties lying wholly within the state can not, under the guise of

interference with interstate commerce, be avoided unless such laws really and substantially, not technically and by fancy affect such commerce.

A familiar illustration of that principle is found in the long line of cases, summarized and given effect to in Sonneborn Bros. vs. Cureton, 262 U. S. 507, which establishes [fol. 19] that the commerce clause of the Constitution makes void and ineffective state laws and state regulations only where there is a definite interference with and a burden upon interstate commerce.

In short, that the commerce clause must be given a practical and reasonable and not a technical application.

Holding the view as I do, that the construction of this railroad neither directly nor indirectly burdens or interferes with, affects or is affected by interstate commerce in its present state, and that the Act invoked therefore has no application, it follows that the injunction prayed for will be denied without prejudice to the right of complainant to again apply when and as the activities of the defendant bring it within the purview of the Act.

Let a decree be prepared accordingly.

J. C. Hutcheson, Jr., Judge.

In United States District Court

Decree—Filed October 6, 1925

This cause having come on to be heard finally on the 15th day of July, A. D. 1925, upon pleadings and proof, the complainant, the respondent and the interveners being represented by their respective solicitors; and the Court being fully advised in the premises and an opinion having been herein filed.

[fol. 20] Now therefore, in accordance with said opinion it is ordered, adjudged and decreed that the injunction prayed for in the bill of complaint and in the respective bills of intervention be and it is hereby denied and that the bill of complaint and the respective bills of intervention be and the same are hereby dismissed, with costs to the respondent, to be taxed against the complainant and interveners.

This decree is without prejudice to the right of the complainant and interveners to hereafter apply for an injunction against the respondent if its activities in the future shall bring it properly within the purview of the Act of Congress known as the Transportation Act of 1920.

To all of which the Complainant and interveners in open Court except and give notice of appeal to the United States Circuit Court of Appeals at Fort Worth.

This 6th day of October, 1925.

J. C. Hutcheson, Jr., Judge.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR RESTRAINING ORDER AND STAY—Filed October 1, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

Now comes the Texas & New Orleans Railroad Company, plaintiff herein, and moves the Court that pending [fol. 21] the appeal from the Court's judgment of date September 28, 1925, denying plaintiff's petition for writ of injunction, that your Honor grant a restraining order in this cause to be continued in full force and effect, or that the Court may by proper order, or otherwise, maintain the status quo until such appeal shall be decided; and for cause plaintiff would show that it filed in this Court its petition praying for an injunction against the defendant, North Side Railway Company, restraining it from building and constructing a railroad in the County of Harris and State of Texas, over and across its property beginning at the Northwest corner of an industrial railroad track owned and operated by the American Petroleum Company and thence in a Westerly direction where it connects with the Municipal Belt Line Railway Company, alleging among other things that said Railroad, when constructed, will engage in interstate commerce and that the construction of said railroad will necessarily force and compel it to engage in interstate commerce, and that the construction and operation of said railroad will materially affect the earning capacities and revenues of the Texas & New Orleans Railroad Company.

The petition of plaintiff alleges that the defendant North Side Belt Railway Company has never applied to nor procured a permit from the Interstate Commerce Commission authorizing it to build, construct and operate said railroad, and plaintiff seeks to enjoin the building and construction of such railroad until it procures a permit from the Interstate Commerce Commission under Sections 18 to 22 of the Transportation Act of 1920.

That on the trial of said cause this Honorable Court denied said writ of injunction upon the ground that the Transportation Act of 1920 did not apply to a railroad con- [fol. 22] structed subsequent to the passage of said act and applied only to such railroad that was actually engaged in interstate commerce at the time of the passage of said act; that the plaintiff, Texas & New Orleans Railroad Company has perfected its appeal from the decree of the United States District Court to the United States Circuit Court of Appeals for the Fifth Circuit, holding at Forth Worth, Texas; that the United States Circuit Court of Appeals will convene at Fort Worth, Texas, in November, 1925—and that the defendant, North Side Belt Railway Company will not be materially injured or damaged by reason of the issuance of such order restraining it from the construction and completion of said road pending said appeal; that the rights of the plaintiff will be materially affected should the defendant North Side Belt Railway Company be allowed to construct and complete said road before the final judgment of the United States Circuit Court of Appeals is entered, passing upon the question of facts and law determined by the District Court, which will probably affect the final termination of said cause, and thus deprive the plaintiff Texas & New Orleans Railroad Company of its rights to have the matters in controversy properly adjudicated and passed upon by the Appellate Court.

Plaintiff now offers to enter into such bond or otherwise conform to such directions in the matter expediting the appeal as the Court shall offer, as condition of awarding the restraining order and stay herein applied for.

Texas & New Orleans Railroad Company, by Baker, Botts, Parker & Garwood and Garrison & Watson, Its Attorneys.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER DENYING APPLICATION FOR STAY—Filed October 6, 1925

On this 6th day of October, 1925, came regularly on to be heard the application of the plaintiff for a stay order, pending the appeal from this Court to the United States Circuit Court of Appeals for the Fifth Circuit, holding at Fort Worth, Texas; and the Court having heard said application and being advised of the premises is of the opinion that the same should be and the same is hereby denied, to which ruling of the Court the plaintiff then and there in open Court duly excepted.

J. C. Hutcheson, Jr., United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed October 6, 1925

To the Honorable J. C. Hutcheson, Judge of said Court:

And now comes the Texas & New Orleans Railroad Company, complainant, by Garrison & Watson, its attorneys [fol. 24] and feeling itself aggrieved by the final decree of this Court entered on the 28th day of September, A. D. 1925, hereby prays that an appeal may be allowed to it from the said decree to the United States Circuit Court of Appeals for the Fifth Circuit at Fort Worth, Texas, and in connection with this appeal, petitioner herewith presents its assignments of error.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the case, and the amount of security may be fixed by the order allowing this appeal.

Texas & New Orleans Railroad Company, by Baker, Botts, Parker & Garwood and Garrison & Watson, Its Attorneys.

Now, to-wit, on the 6th day of October, 1925, at Houston, Texas, it is ordered that the appeal prayed for in the fore-

going petition be, and the same is hereby allowed as therein prayed for.

J. C. Hutcheson, Jr., United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 1, 1925

Now comes the appellant Texas & New Orleans Railroad Company, by Garrison & Watson, its attorneys and in con- [fol. 25] nection with its petition for appeal, says that in the record proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of appellant, to-wit:

I

The Court erred in not holding that the bill of complaint as well as the evidence introduced upon the trial states facts, sufficient to constitute a cause of action and in denying and refusing appellant's petition of an injunction.

II

The Court erred in not finding the following facts:

That the Eastern terminals of the North Side Belt Railway Company, which begins at the Northwest corner of the American Petroleum Company's property and connecting with the North end of the industrial track of the American Petroleum Company and extending south to the ship channel; that the Industrial track owned by J. S. Cullinan, President of the North Side Belt Railway Company, which is carried in the name of "John Doe," forms a part of the North Side Belt Railway Company and extends from the Eastern terminus of the North Side Belt Railway Company to a connection with the industrial track of the Galena Signal Oil Company, which industrial track connects with the Texas & New Orleans Railroad Company where interstate freight is both received and delivered; that *that* a portion of the North Side Belt Railway Company, beginning with the industrial track owned by the Galena Signal Oil Com-

pany and extending East to where it connects with the track of the American Petroleum Company, has been used and was being used prior to the filing of appellant's complaint herein, for the purpose of receiving and delivering inter- [fol. 26] state freight to and from the Texas & New Orleans Railroad Company.

III

The Court erred in holding that Sections 18 to 22 of the Transportation Act of 1920 do not apply to the construction of a new road, but only apply to common carriers engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920.

IV

The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character.

V

The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business.

VI

The Court erred in holding that the construction of the *the* North Side Belt Railway neither directly or indirectly burdens or interferes with, affects or is affected by interstate commerce until the completion of said road and until [fol. 27] it actually begins the handling of interstate commerce.

VII

The Court erred in decreeing that the plaintiff was not entitled to the injunction prayed for, for the reason that the Transportation Act of 1920 did not apply to a road that was being constructed and until the completion of the road, and it was actually engaged in interstate commerce.

VIII

The decree is against the manifest weight of the evidence.

IX

The decree is contrary to law.

X

The Court erred in refusing to grant the application of complainant, Texas & New Orleans Railroad Company, for a temporary injunction restraining the respondents, North Side Belt Railway Company, et al., from building or continuing to build or construct its road bed and track, as prayed for in complainant's original petition pending said appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at Fort Worth, Texas.

Wherefore, appellant prays that the decree of the United States District Court for the Southern District of Texas [fol. 28] may be reversed, and that this Honorable Court grant the writ of injunction prayed for, or direct said District Court to grant said writ.

Texas & New Orleans Railroad Company, by Baker, Botts, Parker & Garwood, Garrison & Watson, Its Attorneys.

In United States District Court

Supplemental Assignment of Error—Filed October 6, 1925

Now comes the plaintiff, Texas & New Orleans Railroad Company and files this its Supplemental Assignment of Error.

The Court erred in refusing plaintiff's application for a stay order, pending final determination of this cause in the Circuit Court of Appeals.

Baker, Botts, Parker & Garwood, Garrison & Watson, Attorneys for Plaintiff.

[fols. 29 & 30] Bond on appeal for 250.00 approved and filed October 6, 1925 omitted in printing.

[fol. 31] In United States District Court

Waiver of Citation—Filed October 6th, 1925

Now comes the defendant, North Side Belt Railway Company, by and through its counsel, and waives the issuance, service, and return of citation on the order of the Court allowing an appeal in favor of the plaintiff, Texas & New Orleans Railroad Company, in the above numbered and entitled cause.

Nelson Phillips, W. W. Moore & J. Y. Powell, Attorneys for North Side Belt Railway Company.

In United States District Court

Statement of Facts—Filed November 10, 1925

Be it remembered, that upon the hearing of the above entitled matter before Hon. J. C. Hutcheson, Jr., on the 15th day of July, A. D. 1925, the following evidence was adduced, to-wit:

Agreement of Facts

Agreement: It is agreed that on the 23rd day of March, 1925, the Northside Belt Railway Company filed with the [fol. 32] Secretary of State of the State of Texas its charter, copy of which is attached, marked Exhibit No. 1.

That the Northside Belt Railway Company has never procured a permit from the Interstate Commerce Commission, as evidenced by attached instruments, marked Exhibit No. 2.

That the proposed line begins at the Northwest corner of the American Petroleum Company's terminal property, there connecting with the private spur track of the American Petroleum Company, which serves its terminal location on the Houston Ship Channel. That it extends in a

Westerly direction where the proposed line will intersect the Municipal & Harbor Belt Railroad. That the Municipal & Harbor Belt Railroad is built and owned by the City of Houston, and handles both interstate and intrastate freight, connecting with the other main lines of the different roads entering the port; that the Municipal & Harbor Belt Railroad is operated by a joint association composed of various main line railroads entering Houston, as per copy of contract attached, marked Exhibit No. 3.

That the attached statement as to business to and from the channel industries during the month of June, 1925, is a correct statement, as far as it goes, but Respondents insist, however, that this is not competent or relevant. This statement is attached hereto and marked Exhibit No. 4.

That on or about the 8th day of June, 1925, the Respondents, in accordance with law, duly filed their proceedings for the purpose of lawfully condemning a right of way across the land of the Complainant, as described in Complainant's Bill. That thereafter such proceedings were duly prosecuted, resulting in an award to the Complainant, in the amount of $750.00. The amount required by law was thereupon by Respondent deposited as required by law with [fol. 33] the Clerk of the Court, and Respondent duly filed the bond required by law in such cases, which was duly approved by the Court, in all things complying with the law of the State of Texas with respect to the condemnation by it as a railroad company of the land in question. That following this, Respondent did take possession of the land in question and on the 13th day of June, 1925, did lay a track across said land, and is now in possession of same thereby, subject to the determination of this suit. That in the condemnation proceedings above referred to, the Complainant participated through counsel and entered its appeal from the final order making the award above referred to.

That immediately after the condemnation proceedings were completed, respondent's counsel advised the engineer in charge of the construction of the railroad that the right of way was available and he proceeded to construct the railroad, completing same about 11 P. M. on the date of the condemnation proceedings. That Mr. W. W. Moore, counsel for Respondent, had information that the applica-

tion for injunction had been made by Complainant and through associate counsel, Mr. Arnold, learned that no restraining order of any kind had been issued. That Mr. Moore accordingly advised the engineer in charge of construction that it was legal for him to proceed with such construction.

That the facts above agreed to apply as well to the interveners and their property as to the controversy between strictly Complainant and Respondent.

It was also agreed that the charter (of the Northside Belt Railway) was applied for, the construction was undertaken and is going on with the idea of completing and finishing the railroad called for in the charter and when completed with the idea and intention of operating the railroad.

[fol. 34] J. S. Cullinan, a witness called by Complainant, testified as follows:

I was not one of the incorporators of this Northside Belt Railway. I am now an officer of the road. I hold the office of President, and am a director. I represent as President a corporation that has a large financial interest through stock in the Galena Signal Oil Co. I am not personally interested in the Galena Signal Oil Co. I may have a few shares of stock personally but I am interested in one of the largest financial interests in the Galena Signal Oil Co. The American Petroleum Co. is a subsidiary of the American Republic Corporation, of which I am President. The Galena Oil Co. and the American Petroleum Co. are in the oil business. They both ship and export oil. Both of those concerns ship oil from their plant and receive oil to their plant from points outside of the State of Texas. I should say only a very small portion of the product of the oil received by them is received from outside of the State. The disposition and sale of our oil from those two concerns is to other states of the Union and foreign countries as well as Texas.

The Galena Signal Oil Co. has several miles of privately owned industrial tracks on its property. The American Petroleum Co. has several miles of tracks which it owns, part of which is on its own property and part of it is on

the Federal Investment Company's property, the greater part being on the Federal Investment's.

With reference to the American Petroleum Co.: The process is, in handling oil in by rail, to pump the oil from the cars and deliver it into storage, into steel tanks. By "storage" I mean steel storage tanks. I do not think we handle it from the cars into barges or boats. I am quite [fol. 35] sure it would be impracticable. I tried to make it clear that the oil would move from the car to storage. Then it could move from storage into either cars back again or to barges or to ships. These storage tanks which we have there are for the purpose of collecting our oil and maintaining stock.

There is a rail connection between the Galena Signal Oil Co. and the American Petroleum Co. over the Federal Investment Company's property, that is owned by myself. The western terminus of it connects with the Galena Signal Oil Company's privately owned industrial track. At its eastern terminus it connects with the American Petroleum Company's privately owned track.

The T. & N. O. Railroad Company has been serving up to now and is still serving the Galena Signal Oil Company, it delivers freight in and out of the Galena Signal Oil Company. It receives freight. If there were 20 or 30 cars of oil delivered to the Galena Signal Oil Co. by the T. & N. O. R. R. Co., the Galena Company would put it on an unloading track, it would connect the unloading line with the cars and with pumps or by gravity that oil would run to the point of the pumps or the gravity basin and then be transferred from there to either storage—If the T. & N. O. R. R. Co. were to deliever 30 cars of oil to the Galena Signal Oil Co. at its terminus at the Galena Signal Oil Company's plant, as now located, and if we were unloading that oil, if the oil was consigned to the Galena Signal Oil Company, you would put the cars, spot them on the switch, connect them with suitable outlet pipes and through those pipes you would carry it to the pump and from the pump you would deliver it into the storage tank.

These properties are two miles or more apart. Now, of course, the Galena Signal Oil Co. is one company and the [fol. 36] American Petroleum Co. is quite another. If it was to be carried to the American Petroleum Co. it would

necessarily have to move over certain rails down to their -racks but when he says broadly the "ship channel" and asks the question broadly about where and how it should move, I can't answer that question intelligently.

The movement of those cars all goes by either pipe line or rail until it gets to the water side. If, at this time and prior thereto, a car of oil should be shipped to the American Petroleum Co., the oil will come consigned to the American Petroleum Co. at Galena, which is a station on the T. & N. O. Road. It would be taken up by the Galena switch engine and then carried over the rails of the Galena Signal Oil Company's private industrial tracks to a point where it would intersect the road, the piece of road which I own, and there would be delivered from that down to the American Petroleum Company's tracks, which are owned by the American Petroleum Company and delivered to its storage tanks.

There is no oil consigned to the Galena Signal Oil Co. which is stored in the American Petroleum Company's tanks or storage. I couldn't answer how I would get it done if I wanted to do it.

This road which I have chartered and which is in controversy, the Northside Belt Railway Company, begins at the Northwest corner of the American Petroleum Company's property. The charter we have secured authorizes us to build a road from the Northwest corner of the American property too, but we haven't exercised that privilege, so far as that particular part of the road is concerned.

This private road or industrial track from the Galena Signal Oil Company connects with the industrial track of the American Petroleum Co. at the Northwest corner of the American Petroleum Company's property. Start- [fol. 37] ing from that corner, we built in a westerly direction. At the western terminus we are connected with the Galena Signal Oil Company's private industrial track.

The purpose of building the road is to serve the industries that we have established on the Houston Ship Channel and such other industries as might build on our own properties. When I say "our," I mean the Federal Investment property which is owned by the Autrey estate and myself, and to serve anything else that may come along that line and to give access to all of the railroads that enter Hous-

ton to that territory. And it is the result of committals that I have been making in Washington before the Congressional Committees, before the War Department, and to industries for 15 to 20 years on the authority of practically, I believe, every Mayor of the City of Houston. That's the purpose behind it.

There are no other industries located on this proposed line other than ours at the moment, and we have held the property for 10 years trying to get other industries on there and were unable to do so because we were not served by the rail lines. As President of the road, if it is constructed and operated, we are to operate it for the public and for the handling and accepting of cars that might be tendered us. We will surely accept cars tendered to us, if we operate the road. I expect to see that the road is operated. I should naturally assume that in the operation of the road it will develop into carrying cars holding interstate business. The record I had when I left here in May was that we had then contracted to move into that terminal approximately 700 cars. We expected to get those cars at various points in Oklahoma, Louisiana, and Arkansas. I would not be prepared to state how many cars, during the month of June, [fol. 38] we received from the T. & N. O. and carried over these industrial tracks to the S. P. Channel, because I haven't the information. We begun doing it in May or June.

It is a fact that we intend and it is so understood that this industrial track or privately owned track connecting with the Northwest corner of the American Petroleum Co. and extending down to the Galena Signal Oil Co. will be made a part of this railroad, or another track that would be built parallel to that track would be made part of the Northside Belt Railroad. Of course, we have room there for four tracks. There is no understanding, except my own, as to consolidation or becoming a part of that road. We have done no grading from the northwest corner of the American Petroleum Company's down to the Galena Signal Oil Co. for the Northside Belt Railroad. We started our grading for that railroad at what we call the trestle or the junction of the Galena tracks with the eastern end. We are grading

it toward the west. We have graded and got our rails located across the property of the T. & N. O.

In running a car or an engine over the property of this chartered railroad from the property of the T. & N. O. to the American Petroleum Company, we would follow the rails that were laid through to the American Petroleum. We have got a connected track clear through. Between the Galena Signal Oil Co. and the American Petroleum Co. we have two grades as a matter of fact, either of which we may use, or both; as to whether we use one or the other or have two tracks on there is not certain, but we have two grades made at the present time. I can't state whether I want the Court to understand that we are not going to use this private track as a part of this chartered railroad company. I don't know what we may do. That is a matter of negotiation with others that are involved, with a number of factories, that I could not foresee or forecast here.

[fol. 39] The Belt Road covered by this charter is not at present finished; we have just started it. We know where we are going to. We are aiming to fulfill as I stated the obligations that we have been making all these 15 or 20 years by building a track that will serve that territory. I have a little map here that would facilitate us in getting an idea that will show exactly where that is located and how, because it is more or less of an involved subject.

Complainant thereupon introduced the map as Exhibit No. 5, same being attached hereto.

This corporation of which I am now the President, known as the Northside Belt Railway, and chartered by the State of Texas under that name to operate as a terminal railway, will under my administration or under those who may succeed me, when finished, operate as a terminal railroad with all the rights and powers which it has under this charter without reference as to whether the freight comes from State or Interstate.

I had this road which is owned by myself built in the name of John Doe. It stands as John Doe, but I have put up the money for it. It is still in the name of John Doe, or in my name, I am not sure about that, but it was built in the name of John Doe.

On cross-examination, he testified:

The Northside Belt Railway Company is not now operating any railroad whatever. It is not operating the track which connects the private industrial track of the Galena Co. with the private industrial track of the Petroleum Company. The Galena Co. are using their power to transfer [fol. 40] the cars back and forth between the American and the Galena. That little stretch of track there between the industrial track of the Galena and the industrial track of the American Petroleum Co. is something less than a mile. This is on land which is owned by Mrs. Autrey, her daughter and myself. The title to the property then, including the tracks on the ground, is still in the owners. The land is still in the owners. That section of track was built in the name of John Doe with the understanding that I would put up the money for payment, which I have done. It does not belong to the Northside Belt Railway Company. At the moment, it is being used simply in connection with the industrial track of the Galena Co. and the American Petroleum Co. That stretch of track which connects these two industrial tracks was authorized in November, to be built. The Northside Belt Railway was chartered in March: This track was built at that time in March, I am quite sure; I am not positive about that, but I am quite sure that it was completed.

I am not prepared to say whether or not that track which connects those two industrial tracks there will be a part of the trackage of the Northside Belt Railway Co., but I hope so. It doesn't belong to it and it is not now operated by it. The Northside Belt Railway Company is not now engaged in any character of commerce whatever. I have no kind of commitment or agreement of any character or kind with any railroad company, corporation, individual, or anyone else on earth, with respect to the receiving or transporting of interstate freight or passengers, though I hope, of course, to make such arrangements at a later time: That is all a matter for the future. That may or may not come about. I have no means of knowing now, except expectation or hope, that we will ever carry any interstate freight on that road, or not.

[fol. 41] The inspiration for constructing this railroad dates back to commitments that I and others have made in

Washington and elsewhere on the authority of the City of Houston and this community and we have made some very serious commitals to industries five or six years ago that have never been carried out by the City of Houston or this community.

Illustrating the point then, as I understand it now, on the 160 acres that's owned or leased by the American Petroleum Co. in which they have invested a very large amount of money, that investment has been standing practically idle for from five to six years. We have looked on representations, if I may interject that much in, of certain people here that they would build a railroad down there, we waited all that time with all this large investment, finding that it was not done. We found it necessary in order to take care of the business that we had in the interior, in Oklahoma, in Texas, in Arkansas, that was offered us on the one side, and the outlet in Europe and on the East Coast on the other side, to proceed with the carrying out of the details made to build a railroad down there to our own plant and a railroad that would be available to other lines and might serve any other industry that would come in.

There was a condition down there which I regarded as needing to be served and on that account planned this railroad. Not only as to our plant, but prospective traffic. I had a purpose in building the road to serve traffic which would come in as soon as they had facilities to our own industries and others which would naturally locate on the ship channel. There are other industries on the north side of the channel besides our own, a number of them. The chief industries are, beginning at the south, or I should have said, beginning at the East, the American Petroleum [fol. 42] Co., the next is the Galena Signal Oil Co., the next is the refinery of the Keen-Wolfe Co., and then there are various small industries between there and the Turning Basin. The Texas Co. has a plant down there. That property is practically undeveloped beyond the Galena Signal Oil Co. On that side of the channel, the T. & N. O. operates down to the West line of the Galena Signal Oil Company's property. I understand it to be a part of the Southern Pacific System. That's the only road at the present time that serves that territory, excepting the Municipal Belt Railroad comes to its docks. The American Petroleum

Co. is a pipe line, storer and buyer and seller and handler of oil by cars and ships and pipe lines. It has a large storage facility there; I believe 18 tanks of mainly 55,000 barrels capacity. It stores a great quantity of oil. The Northside Belt Railway Company when completed will be approximately 5 miles long.

E. A. O'DONNELL, called as a witness for Complainant, testified as follows:

I live here in Houston. Am Superintendent of Terminals for the Southern Pacific. I am familiar with the Company's property down here on the channel, around the Galena Signal Oil Co. The Texas & New Orleans' corporate property traverses the North side of the channel, as far as the west side of the Galena Signal Oil Company's property. That is the T. & N. O.'s private property that I spoke of. The Port Terminal Railroad Association is a company operating a company or what I believe is known as the Municipal Belt, a Houston owned railroad serving industries adjacent to the channel. It is not operated by the City, the cost of the operation is pro rated by the main [fol. 43] line carriers entering Houston on a per car basis. The Municipal Belt Railroad is all operated by one operating company but the expense is borne by the various carriers. And it is operated that way. A check of the business to and from 12 of the most important industries situated along the channel on both sides for the month of June indicated that a little over 50% was interstate traffic in and out. I just examined the records for June. I took the most current month. I did not examine any more records. I have a statement here showing about what it is. I made it.

I am familiar with that map. No such railroad as this "Port Navigation," which is supposed to be a railroad there, exists at the present time parallel with the T. & N. O. There is no such railroad, there might be a proposed right of way but there is no railroad. Beginning from this point, the northwest corner of the American Petroleum Co., this parallel red line shows the proposed road of the Northside Belt Company, being built by Mr. Cullinan. I

believe it is proposed to intersect the Port Terminal Co. up here. I know of the railroad as it exists as far as where it crosses the T. & N. O. Railroad track. I say, I know of this Northside Belt Railroad as far as it exists over and across the T. & N. O. property. I don't know of their line beyond that except from hearsay, that they propose to go some place and connect with the Port Terminal Railroad. With reference to the T. & N. O. property down there, this bayou or the channel, that is properly and correctly shown there.

A. R. Atkinson, called as a witness by Complainants, was sworn and testified as follows:

I am Assistant General Freight Agent of the Southern Pacific:

[fol. 44] I am acquainted with the Houston Belt & Terminal Co. I know where that property is situated. I could not tell you whether or not it extends beyond the limits of Harris County or not. My understanding is it is a Terminal Co., the Houston Belt & Terminal Co. that serves the tracks here. The Houston Belt & Terminal Co. file their tariff covering interstate business with the Interstate Commerce Commission. I have a copy of it here.

Complainants thereupon introduced the tariff identified, which is attached hereto, marked Exhibit No. 6.

I have a tariff here filed by the Houston Belt & Terminal Co. covering their charges on intrastate and interstate traffic which is filed with the Interstate Commerce Commission.

Geo. M. Crittenden, called as a witness by Complainants, testified as follows:

I live here in Houston, and am Auditor for the Port Terminal Railroad Association. The Port Terminal Railroad Association is an association of all the trunk lines entering Houston, and it is the lessee of the Municipal Belt Railroad. The charges and the revenues are pro rated to the member lines on the basis of cars handled, relative number of cars handled during the month.

The proceeds are turned over to the various roads in proportion to the number of cars handled by the roads; however, the expenses exceed the revenues. The Port Terminal Co. does not make any report to the Interstate Commerce Commission. The railroad companies take their proportional part of the earnings into their earnings as a part of the main earnings. I mean, we handle—this expense is pro rated to the member lines and we make a bill against [fol. 45] them and I presume they take it into their operating expenses. I do not file any tariffs with either the Interstate or the State Commission, not in that name of the Port Terminal Railroad Association. It has no published tariffs anywhere. I don't know just what our legal status is. We are an association. We own one car. We lease our power. We are leasing at present four locomotives and we handle the cars of the member lines to their destination. We operate it as though all the member lines owned this little piece of road. I think we do not treat it as an independent piece of road at all, but merely as a part of all of the roads connected with it; we merely act as their agent in delivering the freight. So far we have no accounts filed anywhere, no reports filed with any Commission, no reports made to any Commission. Our associahtion is the only association or company that operates this Municipal Belt Railroad. I couldn't state whether the Interstate Commerce Comimssion undertakes to regulate our charges that I spoke about.

The expenses of the operation are pooled. They are borne by the Rialroad Companies who are members of this pool. The Interstate Commerce Commission has not so far attempted any kind of regulation with respect to those charges or those expenses. We are keeping them in accordance with the Interstate Commerce Commission's classification of accounts. We collect revenue on shipments moving within the Terminal or on intra-terminal business. But on interstate bsuiness we do not collect anything, the railroad agents collect that. All the relation we have with the shippers is on local inter-city hauls. The contract does not provide for a flat rate for switching, so much per car. We pool the expenses and bill it out on the number of cars handled for each line.

There's a tariff gotten out by all the railroads of Houston. It is not in the name of our association. These tariffs [fol. 46] that are gotten out contain in them the rates, the schedules for the charges made on the Municipal Belt Line. I have one of those tariffs with me. The entire terminals of the Port Terminal Railroad are operated by the various roads under this association, in its name. And then connecting with the Port Terminal, and we are connected with the main lines of this association. We are not chartered. We are operating under a contract. It is just a name, we are not a company.

The Tariff was thereupon introduced and is attached hereto, marked Exhibit No. 7.

The map tendered by Mr. Garrison was marked Exhibit No. 8, and is also attached hereto.

E. A. O'Donnell, recalled as a witness for Complainants, testified as follows:

The expense of the Port Terminal Railroad Association is divided on a per car basis between the Southern Pacific Lines, the M. K.-T. the I.-G. N., and the Houston Belt & Terminal representing its tenant lines,—the Santa Fe, the T. B. V., and the Gulf Coast Lines. The Houston Belt represents those lines.

Exhibit No. 1 in Evidence

State of Texas,
County of Harris:

Know all men by these presents:

That we, the subscribers, all citizens of Harris County, Texas, under the provisions of the Revised Statutes of the State of Texas, do hereby form and incorporate ourselves into a voluntary association, for the purpose of construct-[fol. 47] ing, owning, maintaining and operating a terminal railway in accordance with the provisions of Subdivision 53, of Article 1121, Vernon's Texas Civil Statutes, 1918 Supplement, and to that end we hereby adopt and subscribe the following Charter:

Article 1. This corporation shall be known as the Northside Belt Railway Company, and by which name it shall contract and be contracted with, sue and be sued, and transact all of its business.

Article 2. This Corporation is formed for the purpose of constructing, owning, maintaining, and operating a terminal railway; and this corporation, in addition to the rights conferred by law upon corporations generally, shall have and exercise all of the rights, powers, and privileges conferred by subdivision 53, Article 1121, Vernon's Texas Civil Statutes, 1918 Supplement, including the rights, power, and privileges conferred upon railroad companies by Chapters 8 and 9 of Title 94, of the Revised Statutes of the State of Texas relating to Railroads. The main line of railway of this Corporation shall be construed, commencing at the Northwest corner of the American Petroleum Company's Terminal property, thence to extend in a westerly direction to intersect with the main line of the Houston Municipal & Harbor Belt Railroad in the Northeastern part of the City of Houston, a distance of approximately five (5) miles, and located wholly within Harris County, Texas.

Article 3. The place of business of the Corporation shall be the City of Houston, Harris County, Texas, which shall be its principal office.

Article 4. Said Corporation shall exist for a term of fifty (50) years, and at the end of said term this Charter may be continued in the manner provided by law.

[fol. 48] Article 5. The business of the Corporation shall be transacted by seven directors, who shall be elected by the stockholders annually. The following named stockholders are declared to be directors for the first year, and in them shall be vested the government of the corporation, and the management of its affairs.

Name	Residence
A. M. Johnson	Houston, Texas.
J. Y. Powell	Houston, Texas.
T. J. Arnold	Houston, Texas.
H. J. Cullinan	Houston, Texas.
G. R. Morgan	Houston, Texas.
W. T. Sinclair	Houston, Texas.
Beeman Strong	Houston, Texas.

Article 6. The amount of the capital stock of the corporation shall be Ten Thousand Dollars ($10,000.00) divided into One Hundred (100) shares of One Hundred ($100.00) Dollars each, all of which capital stock has been subscribed and all of which has been paid in, as per affidavit hereto attached.

In testimony whereof, we hereunto sign our names this the 19th day of March, A. D. 1925.

A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. R. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, G. S. Harrington, Beeman Strong.

[fol. 49] STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. R. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, C. S. Harrington and Beeman Strong, known to me to be the persons whose names are subscribed to the foregoing instrument, and severally acknowledged to me that he executed the same for the purposes and consideration therein expressed.

In testimony whereof, I hereunto subscribe my name and affix the seal of my office, this the 19th day of March, A. D. 1925.

J. L. Rundell, Notary Public in and for Harris County, Texas. (Seal.)

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. R. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, C. S. Harrington and Beeman Strong, known to me, who having been by me first duly sworn, on oath say each for himself:

That they are the identical parties who executed the Charter of the Northside Belt Railway Company, as incorporators; that the full amount of the capital stock of

said Corporation has been in good faith subscribed and fully paid in; that the following are the names and post office addresses of the parties subscribing to the capital stock:

Name	P. O. Address
[fol. 50] A. M. Johnson	Houston, Texas.
J. Y. Powell	Houston, Texas.
T. J. Arnold	Houston, Texas.
W. W. Moore, Jr	Houston, Texas.
G. R. Morgan	Houston, Texas.
W. T. Sinclair	Houston, Texas.
T. J. Mullin	Houston, Texas.
H. J. Cullinan	Houston, Texas.
C. S. Harrington	Houston, Texas.
Beeman Strong	Houston, Texas.

That the amount subscribed by each and the amount paid in by each, is as follows:

Name	Amount Subscribed	Amount Paid In
A. M. Johnson	$9,100.00	$9,100.00
J. Y. Powell	100.00	100.00
T. J. Arnold	100.00	100.00
W. W. Moore, Jr	100.00	100.00
G. R. Morgan	100.00	100.00
W. T. Sinclair	100.00	100.00
T. J. Mullin	100.00	100.00
H. J. Cullinan	100.00	100.00
C. S. Harrington	100.00	100.00
Beeman Strong	100.00	100.00

That the above subscriptions were paid in cash.

A. M. Johnson, J. Y. Powell, T. J. Arnold, W. W. Moore, Jr., G. L. Morgan, W. T. Sinclair, T. J. Mullin, H. J. Cullinan, C. S. Harrington, Beeman Strong.

[fol. 51] Sworn to and subscribed before me on this the 19th day of March, A. D. 1925. J. L. Rundell, Notary Public in & for Harris Co., Texas. (Seal.)

Certificate

I hereby certify that the attached original articles of Incorporation of Northside Belt Railway Company were submitted to me on the 23rd day of March, 1925, and that having carefully examined the same I find them in accordance with the provisions of Chapter 1, Title 115, of the Revised Statutes of Texas, and not in conflict with the laws of the United States or of the State of Texas.

Wright Morrow, Acting Attorney General. (Seal.)

Indorsed: Filed in the office of the Secretary of State this 23 day of March, 1925. D. A. Gregg, Chief Clerk & Acting Secretary of State.

The State of Texas, Department of State

I, Emma Grigsby Meharg, Secretary of State of the State of Texas, do hereby certify that the foregoing is a true and correct copy of Charter of Northside Railway Company, as filed in this office March 23, 1925, with the indorsement thereon, as now appears of record in this Department.

[fol. 52] In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the seal of State at my office in the city of Austin, this 9 day of June, A. D. 1925.

Emma Grigsby Meharg, Secretary of State. (Seal.)

Exhibit No. 2 in Evidence

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of letter dated Washington, June 19, 1925, addressed to Mr. Charles H. Bates, Attorney at Law, Suite 224 Mills Bldg., 17th St. & Pennsylvania Ave. N. W., Washington, D. C., signed G. B. McGinty, Secretary

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 20th day of June, A. D. 1925.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 53] Interstate Commerce Commission, Washington

June 19, 1925.

Mr. Charles H. Bates, Attorney at Law, Suite 224 Mills Bldg., 17th St. & Pennsylvania Ave. N. W., Washington, D. C.

Dear Sir: Replying to your letter of the 17th instant, I would advise that we have no record of an application having been filed by the Northside Belt Railway Company asking for a certificate of public convenience and necessity for construction of a terminal railroad in Harris County, Texas. It follows therefore that no certificate has been issued to this carrier for authority to construct such a terminal railroad.

Yours very truly, G. B. McGinty, Secretary.

Exhibit No. 3 in Evidence

Port Terminal Railroad Association

Agreement covering the maintenance and operation of the Port Terminal Railroad Association, Effective July 1st, 1924

The State of Texas,
County of Harris:

This agreement witnesseth the following contract this day entered into by and between the parties hereto, to-wit:

[fol. 54] (1) Navigation and Canal Commissioners of Harris County Houston Ship Channel Navigation District, acting for said District and hereinafter referred to as Navigation and Canal Commissioners;

(2) Southern Pacific Lines, a railroad system consisting of: Texas and New Orleans Railroad Company, The Houston, East & West Texas Railway Company, The Galveston, Harrisburg and San Antonio Railway Company, Houston & Texas Central Railroad Company;

(3) International-Great Northern Railroad Company;

(4) Gulf Coast Lines, a railroad system consisting of:

The St. Louis, Brownsville and Mexico Railway Company,
The Beaumont, Sour Lake & Western Railway Company;
(5) Gulf, Colorado and Santa Fe Railway Company;
(6) Trinity & Brazos Valley Railway Company;
(7) The San Antonio & Arkansas Pass Railway Company;
(8) Missouri-Kansas-Texas Railroad Company of Texas;
(9) Sugar Land Railway Company.

I

Name

The name under which the parties hereto shall conduct and carry on the business for which this contract and agreement is made and entered into shall be:

[fol. 55] "Port Terminal Railroad Association," hereinafter referred to as the Association.

II

Purpose

(a) The purpose of this Association is, on equal terms and conditions, to provide impartial, efficient, unified and economical switching service, by an independent and neutral organization, separate and distinct from the organization of, but for the benefit of all the parties hereto, to serve publicly owned wharves, docks, elevators or other water terminal facilities, and publicly owned railroad facilities, now existing or hereafter constructed on or immediately adjacent to either side of the Houston Ship Channel between the Turning Basin and Lynchburg so as to thereby afford every railroad entering the City of Houston access thereto without discrimination, so far as may be.

(b) To provide the same character of switching service for all privately owned wharves, docks, elevators or other privately owned water terminals, and for all privately owned industries now or hereafter constructed on or immediately adjacent to either side of the Houston Ship Channel, as aforesaid.

(c) The Association shall not undertake to serve any water front now owned by any railroad a party hereto or

any privately owned wharf, dock or industry now served exclusively by any railroad a party hereto, with the exception of the Manchester and Galena industries; but this shall not be construed to mean that the Association shall not hereafter serve privately owned wharves or industries so [fol. 56] located should the owner or owners thereof at his or its cost construct a spur track from such property to the tracks of the Navigation District included in this operation, in which event the Association shall perform such switching service.

III

Management

The control and management of the affairs of the Association shall be vested in a Board of Control consisting of one representative of each of the railroads or railroad systems and one representative of the Navigation and Canal Commissioners parties hereto, each of whom shall have one vote. The Southern Pacific Lines, consisting of the following railroad corporations, viz.—Texas and New Orleans Railroad Company; The Houston, East and West Texas Railway Company; The Galveston, Harrisburg and San Antonio Railway Company; and Houston & Texas Central Railroad Company; shall jointly have one vote only; and the Gulf Coast Lines, consisting of the following railroad corporations, viz.—The St. Louis, Brownsville and Mexico Railway Company and The Beaumont, Sour Lake & Western Railway Company, shall jointly have one vote only.

All other railroad or railway companies, parties hereto, shall each be entitled to one vote.

Any railroad entering the City of Houston, which may hereafter desire to become a party hereto, may do so on the same terms and conditions.

Any other railroad or railroad system that may hereafter join the Association shall be entitled to one vote and if any railroad or railroad system withdraws from the Association as provided in Article XIV hereof, the total number of votes shall be correspondingly reduced.

[fol. 57] In the event that through stock ownership, lease, consolidation or otherwise, any railroad company or system, a party hereto, shall be acquired, controlled or operated,

directly or indirectly, by any other railroad company or system, party hereto, or by any other railroad company or system owning or controlling in any way other railroad company or system, a party hereto, the separate vote and representation of the railroad company or system so acquired, controlled or operated shall forthwith terminate.

The Board of Control shall exercise complete authority and supervision over all operating affairs of the Association, in accordance with the terms of this contract, and may provide whatever supervisory officers the Board may consider necessary for the proper conduct of the affairs of the Association.

The officers and employees employed by the Board of Control shall be well versed in the railway operation. The compensation paid shall be commensurate with the duties performed and comparable with the remuneration allowed by railroads generally in Texas.

The representative of the Navigation and Canal Commissioners shall be chairman of the Board of Control and preside at all meetings thereof.

Meetings of the Board of Control shall be held monthly, and members thereof may be present in person or by proxy, and meetings may be called at any time by the Chairman and shall be called by him whenever requested in writing so to do by one or more members.

A majority of the members thereof shall constitute a quorum for the transaction of business at all meetings, and an accurate written record shall be kept of all proceedings thereof by a Secretary appointed by the Board.

The minutes of each meeting shall be read at the next meeting and approved in the usual manner.

[fol. 58]

IV

Neutral Management

(a) Such rules and regulations shall, from time to time be adopted and promulgated by a majority vote of the Board of Control as it shall deem appropriate and necessary to *efficit* and economically perform the switching service herein contemplated and to properly facilitate the conduct of its affairs.

(b) All rules, regulations and orders issued by the Association shall be reasonable, just and fair to all railroads, parties hereto; and the management and conduct of the operation shall be at all times without discrimination or preference, and the Board of Control shall at the written request of any one of the parties hereto, remove from its service any officer or employee who is shown to have failed or refused to observe this requirement.

V

Railroad Facilities to be Included

(a) All railroad tracks and facilities now or hereafter owned, leased or constructed by the Harris County Ship Channel Navigation District, hereinafter referred to as the Navigation District, substantially as indicated by the blue print drawing D-2-40, hereto attached and made a part hereof, marked "Exhibit A," so colored as to show the tracks now owned and proposed to be constructed by the Navigation District and those leased from other railroads.

(b) The Navigation and Canal Commissioners shall proceed diligently with its present construction program, as [fol. 59] outlined on the accompanying blueprint, including a suitable roundhouse and other necessary fixed equipment.

(c) All tracks now owned or leased by the Navigation District to be ballasted and in good condition when turned over to the Association for operation, and all tracks constructed or leased in the future must be likewise ballasted and in good condition before turning same over to the Association for operation; and at the termination of this contract, such tracks will be returned by the Association to the Navigation and Canal Commissioners in like condition, less ordinary wear and tear.

(d) The Navigation and Canal Commissioners shall furnish the initial supply of tools and movable equipment necessary for the proper and efficient maintenance and operation of the facilities covered by this agreement.

VI

Compensation

(a) The Association shall pay the Navigation District Sixty-seven and one-half (67½) cents for each and every loaded car passing in either direction over the Navigation District's tracks and also between any two points on the Navigation District's tracks, except that for cars in intra-city switch business the charge shall be Thirty-three and three quarters (33¾) cents per loaded car moving over the tracks of the Navigation District in either direction, further, that nothing shall be paid for locomotives, empties or for cars loaded with material for maintenance of the tracks included herein.

[fol. 60] (b) The Association shall, at its cost and expense, maintain the tracks and other property turned over to it by the Navigation District in a safe and efficient operating condition; and at the termination of this contract, the Association obligates itself to return them to the Navigation District in the same condition. This, however, shall not include the maintenance of sub-structures under tracks on wharves or warehouses, wharf approaches or covering of wharves.

(c) The Navigation and Canal Commissioners reserve the right to inspect the facilities at any and all times, advising the Association in writing if, in the judgment of the Nav-gaton and Canal Commissioners, the facilities are not being maintained in a safe and efficient operating condition.

If dispute should rise between the Navigation and Canal Commissioners and the Association as to proper maintenance of the facilities, three competent arbitrators shall be appointed to settle the controversy; one arbitrator each to be selected by the Association and the Navigation and Canal Commissioners, and the two arbitrators so appointed shall choose the third, and the decision of a majority thereof shall be binding on all parties thereto.

(d) The Association shall, at its own expense, pay its proper proportion of the maintenance cost of the tracks leased by the Navigation District, as covered by contracts with railroads, parties hereto.

VII

Use of Facilities

(a) Use of tracks of the railroads parties hereto and leased for the purpose hereof shall be for the passage of [fol. 61] trains and engines of the Association only and not for any railroad other than the owner thereof, nor shall said tracks be used for the purpose of springing any other tracks therefrom except with the consent of the owner thereof.

(b) Use of all tracks shall be confined to cars and engines of the Association except any member railroad may use the tracks owned by the Navigation District or tracks leased by it from the City of Houston, upon reasonable rules and terms prescribed by the Navigation and Canal Commissioners for the performance only of interchange between such railroad party hereto and the Association.

VIII

Per Diem and Demurrage

(a) Cars in line-haul service or cars in intra-city switch service while on the tracks operated by the Association shall remain in the per diem accounts of the respective interested railways who shall make all per diem settlements for such cars. Demurrage shall be assessed and collected by each interested railway covering its own business. The switching revenue for the service covered in this paragraph shall accrue to the interested carrier.

(b) On cars in intra-plant or inter-plant business or exclusive Association business, rental at the current per diem rate shall be paid by the Association to the Railway in whose account the cars stand. Bills for such per diem shall be rendered by the interested carriers, paid by the Association [fol. 62] and charged to operating expenses. Demurrage accruing on cars in such service will be collected by the Association and treated as revenue. The switching revenue for the service covered by this paragraph shall accrue to the Association.

(c) By the term "intra-plant" is meant the movement of a car from one location to another location on the same track at an industry or the movement from a location on one track to a location on another track at the same industry.

By the term "intra-plant" is meant cars moving between plants located on the ship channel on Navigation District tracks. By the term "intra-city" is meant cars moving between points on the Navigation District tracks and points on the tracks of member lines on the ship channel and between points on the Navigation District tracks and points on the tracks of member lines within the switching limits of Houston.

IX

Taxes, Public Assessment, etc.

(a) The Association shall not be required to pay any taxes of any kind or character on tracks or facilities owned by the City of Houston, the Navigation District, or tracks leased from Railroads, parties hereto. Public assessments for paving, sewer, etc., and levies of every character, additions and betterments to tracks and facilities of Navigation District and City of Houston to be paid for by the Navigation District, provided no additions and betterments shall be made without first securing permission in writing of the Navigation and Canal Commissioners.

[fol. 63] (b) Additions and betterments to tracks owned by any railroad party hereto and leased to the Navigation District, to be made by owning line and added to valuation. In any renewal of structure such as drawbridges, or other steel bridges or piers made during the term of this agreement, only such proportion of the operation expenses in connection with such renewal shall be charged to the Association as the length of time such structure has been used by the Association bears to the total life of such structure since its last complete renewal.

(c) It is understood and agreed that the Navigation District will assume any pay the rental charges on tracks leased from the Railroads parties hereto.

X

Division of Revenue and Expenses

All revenue of association and all expenses incurred in maintenance and operation thereof, including personal injuries, loss and damage and all other casualty expenses properly chargeable to the Association, to be divided between railroads parties hereto (Navigation District not included) on basis that number of loaded and empty cars handled for all member railroads, except that only 50% of the loaded and empty cars handled in intra-city switch service shall be counted. Loaded and empty cars shall be counted once when entering upon the Navigation District's tracks and once when leaving them, intermediate moves not to be counted. Cars in work service and cars in intra-plant or inter-plant service or exclusive Association business shall not be counted.

[fol. 64] Records of parties hereto, insofar as they pertain to joint operation and records of Association, to be open to inspection by any and all parties hereto, and the parties hereto will, from time to time, appoint committee to audit books of the Association and make report to all parties to this agreement.

XI

Switch Engines, Equipment, etc.

Railroads, parties hereto, shall furnish necessary switch engines, caboose and work equipment required by the Association to efficiently operate the unified switching arrangement, each railroad or railroad system party to the agreement, to provide its pro rata of such switch engines, caboose and work equipment in rotating periods on basis of division of operating expenses. Rental of locomotives to be on basis of A. R. A., or usual rental charges; rental of caboose and work equipment to be on basis of current rates in use on railroads, parties hereto. Heavy and general repairs to be made and paid by the Association. Repairs to cars to be made and paid for by the Association, in accordance with current A. R. A. rules. In case of any repairs made necessary by accident or carlessness of As-

sociation employees, the Association shall pay the cost of such repairs. If such accident shall result in substantial destruction of any locomotive or car, the Board of Control shall determine whether same shall be repaired by the Association or whether the Association shall pay the owning road the amount of such damage.

Railroads, parties hereto, to furnish necessary cars for revenue loading over their lines, all such cars to be returned to delivering line. The Association will be responsible for the violation of car service rules or misuse of cars in its possession.

[fol. 65]

XII

Unforseen Destruction of Physical Property

Partial or whole destruction of jointly used physical property by wars, floods, acts of God or any other action beyond the foresight or control of the Association, to be reconstructed or restored by Navigation District or owning line or lines, at its or their expense, as their respective interests may appear.

XIII

Working Capital

Railroads or railroad systems, parties hereto, will each advance the Association as working capital, the sum of $5,000.00. After the Association has been in operation sufficient length of time to determine proportion of operating expenses chargeable to each railroad or railroad system, working capital will be applied to payment of operating expenses until it is exhausted and thereafter the Association will draw on each railroad or railroad system, party hereto, on first and fifteenth of each month for its proportion of operating expenses, such amounts, including errors and discrepancies in bills to be adjusted monthly, to the actual proportions due from each such road.

Each member railroad or railroad system guarantees payment of drafts on its line of the Association as they are drawn.

XIV

Term of Contract

This agreement shall become operative on July 1, 1924, and remain in effect for one year and thereafter, unless [fol. 66] or until any railroad or railroad system, party hereto, should desire to withdraw from the Association. In the event any railroad or railroad system should desire to do so, it may at any time after July 1, 1925, give notice in writing to all parties hereto of such intention; and such withdrawal shall be permitted and become effective at the end of a period of one (1) year from the date of such written notice.

Upon the receipt of such written notice of withdrawal, any railroad or railroad system not desiring to withdraw from the Association, shall, within sixty (60) days from the receipt of such notice of purpose to withdraw by a member of the Association, give notice in writing to the other parties hereto of their desire to carry on and continue the business of the Association; and should they do so, this contract and agreement shall remain in full force and effect, subject to the right of any railroad or railroad system so remaining to give notice in writing of its or their desire to withdraw from the Association, by giving the written notice herein provided for, effective at expiration of one (1) year from the date of such notice.

The Navigation and Canal Commissioners shall have the right to terminate this contract, should it desire to do so, by giving written notice at any time after July 1, 1925; and should such notice be given, this contract shall cease and be determined twelve (12) months from the date of such written notice.

In the event that any of the provisions of this agreement shall be found, in practice, to operate unjustly with respect to or to be unduly burdensome upon any party or parties hereto, it is agreed that the party or parties so aggrieved may demand a modification of this agreement so that such injustice shall be remedied and all parties hereto agree to [fol. 67] meet such demand in a spirit of fairness and justice and to modify this agreement accordingly.

Witness our hands this 30th day of June, 1924.

Navigation and Canal Commissioners of Harris County Houston Ship Channel Navigation District, by (Signed) E. A. Peden, Chairman. Texas and New Orleans Railroad Company, by (Signed) W. R. Scott, President. The Houston, East & West Texas Railway Company, by (Signed) W. R. Scott, President. The Galveston, Harrisburg & San Antonio Railway Company, by (Signed) W. R. Scott, President. Houston & Texas Central Railroad Company, by (Signed) W. R. Scott, President. International-Great Northern Railroad Company, by (Signed) T. A. Hamilton, President. The Saint Louis, Brownsville & Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company, Gulf Colorado and Santa Fe Railway Company, by (Signed) F. J. Pettibone, Vice-President & Gen. Manager. Missouri-Kansas-Texas Railroad Company of Texas, by (Signed) C. A. Whitehead, Executive Vice-President. Trin-
[fol. 68] ity & Brazos Valley Railway Company, by (Signed) John A. Hulen, Receiver. The San Antonio & Arkansas Pass Railway Company, Sugar Land Railway Company, by (Signed) W. T. Eldridge, President.

Approved as to Form: (Signed) Thos. H. Ball, Counsel.

Approved as to Terms and Conditions: (Signed) W. B. Drake, Superintendent Public Belt Railroad.

Approved: (Signed) —— Farrar, Chairman Railroad Committee.

Approved as to Form: Baker, Botts, Parker & Garwood, General Attorneys, Southern Pacific Lines. Andrews, Streetman, Logue & Mobley.

[fol. 69] We, the respective attorneys for the parties of record do hereby agree that the above 31 pages of typewritten matter with certain exhibits not attached hereto, constitute a full, true and correct statement of facts in this cause.

Garrison & Watson, Attorneys for T. & N. O. R. R. Co. Nelson Phillips, W. W. Moore & J. Y. Powell, Attorneys for Northside Belt Railway Co.

Statement of facts. Filed 10 day of Nov. 1925.

[fol. 70] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 71] Minute entry of argument and submission, Jan. 3, 1927, omitted in printing.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 4718

TEXAS & NEW ORLEANS RAILROAD COMPANY, Appellant,

VERSUS

NORTH SIDE BELT RAILWAY COMPANY, Appellee

Appeal from the District Court of the United States for the Southern District of Texas

Jno. T. Garrison (H. M. Garwood and Jno. T. Garrison on the brief), for Appellant.

Nelson Phillips (W. W. Moore, J. Y. Powell and Nelson Phillips on the brief), for Appellee.

OPINION FILED—January 8, 1927

Before Walker, Bryan, and Foster, Circuit Judges

WALKER, Circuit Judge:

This was a suit by the appellant which sought only a temporary restraining order and an injunction restraining the appellee from prosecuting a suit instituted by it for the condemnation of described land of the appellant and from constructing, maintaining or operating a described railroad upon or across that land. The appeal is from a decree dismissing the bill without prejudice to the right of the appellant to apply in the future for an injunction against the appellee "if its activities in the future shall [fol. 73] bring it properly within the purview of the Act of Congress known as the Transportation Act of 1920." It is

disclosed by the record that no restraining order or interlocutory injunction was issued, and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done. In the situation disclosed the dismissal of the bill without prejudice was proper. Smyth v. Asphalt Belt Ry. Co., 12 Fed. (2d), 14. The decree is

Affirmed.

[fol. 74] In United States Circuit Court of Appeals

[Title omitted]

Decree—January 8, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Texas & New Orleans Railroad Company, and the surety on the appeal bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 75-80] Petition for rehearing covering 5 pages, filed January 28, 1927, omitted from this print. It was denied and nothing more by order February 10, 1927.

[fol. 81] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—February 10, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] Supreme Court of the United States

Order Allowing Certiorari—Filed June 6, 1927.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 6, 1927.

No.....

IN THE

Supreme Court of the United States

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Petitioner,

versus

NORTHSIDE BELT RAILWAY COMPANY,

Respondent.

PETITION OF TEXAS AND NEW ORLEANS RAILROAD COMPANY

FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now comes Texas and New Orleans Railroad Company, a corporation, against which the judgment of the District Court of the United States for the Southern District of Texas, Houston Division, as well as the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment first

mentioned, was rendered in this cause, and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, to review the decision of said Court in this cause, and represents and shows to the Court:

I.

Texas and New Orleans Railroad Company, hereinafter styled "PETITIONER", is a corporation created and existing under and by virtue of the laws of the State of Texas, is a resident citizen of Houston, Harris County, in the Southern District of said State, and is there domiciled.

Northside Belt Railway Company, hereinafter styled "RESPONDENT", is a corporation created and existing under and by virtue of the laws of the State of Texas, is a resident citizen of Houston, Harris County, in the Southern District of said State, and is there domiciled.

Counsel for respondent are Nelson Phillips, Esq., of Dallas, Texas, and W. W. Moore, Esq., and J. Y. Powell, Esq., of Houston, Texas.

II.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

(1) *Brief statement of the issues involved*: The District Court of the United States for the Southern District of Texas held in this cause that Paragraph (18) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, (set out in Appendix A) which provides that no carrier by railroad subject to the Interstate Commerce Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire

or operate any line of railroad, or extension thereof, or shall engage in transportation under the Act over or by means of such additional or extended line of railroad unless or until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such additional or extended line of railroad, is not applicable to the construction by a new railway corporation of a railroad before the corporation becomes engaged or offers to engage in the actual transportation of interstate freight or passengers; said District Court having held and rendered judgment that said provisions become applicable or effective only when or after a new corporation which has constructed a line of railroad is actually engaged or offers to engage in interstate commerce—that is to say, that while existing railroads already engaged in interstate commerce may not extend their lines or operations without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, new railroad corporations are entirely free from any such regulation and may construct their lines *ad libitum* without a certificate of public convenience and necessity, until such time as they shall actually begin to operate as instrumentalities of interstate commerce.

Petitioner respectfully contends that this holding is erroneous.

The Circuit Court of Appeals affirmed the judgment aforesaid on the ground that (though the suit was to enjoin and restrain respondent from condemning for the purposes of its incorporation certain lands of petitioner, a common carrier subject to the Interstate Commerce Act; to enjoin and restrain the con-

struction by respondent of its line of railroad across said land; to enjoin and restrain the maintenance of said railroad across said land; and to enjoin and restrain the operation of said railroad across said land) the issues had become moot, because at the time of the institution of the suit the condemnation proceedings had been carried to a point where the respondent, plaintiff in said condemnation proceedings, had procured an assessment of damages by special commissioners; and by depositing in the State Court in which said condemnation proceedings were pending double the amount of said award and filing a certain bond had acquired the right under the State law to go upon the land and construct its line of railroad; and because respondent had, with notice of the suit and under cover of night actually constructed its railroad across said land prior to the trial on the merits, notwithstanding the suit also sought to enjoin the maintenance of said railroad and, notwithstanding further, the suit sought to enjoin the operation of said railroad, which operation had not been begun at the time of the trial of the cause and has not yet been begun.

Petitioner respectfully contends that the ruling of the said Circuit Court of Appeals in affirming the judgment of the District Court and in holding that the issues had become moot is erroneous.

(2) *Statement of the pleadings*: Petitioner, Texas and New Orleans Railroad Company, filed its bill in the District Court of the United States for the Southern District of Texas, Houston Division, on June 13, 1925, alleging:

That petitioner is a corporation of the State of Texas, having its domicile in the City of Houston, Harris County, in the Southern District of said State; that respondent is a corporation of the State of Texas,

having its domicile in the City of Houston, Harris County, in the Southern District of said State; that respondent was created and exists for the purpose of constructing, owning, maintaining and operating a terminal railway wholly within the State of Texas and is a common carrier by railroad subject to the Interstate Commerce Act, as amended, and particularly subject to the terms and provisions of the Transportation Act of 1920.

That respondent has projected and is constructing or about to construct a certain main line of railway of the length of about five miles in Harris County, Texas, and has instituted or has caused to be instituted a certain condemnation suit in the County Court at Law of Harris County, Texas, against petitioner for the purpose of condemning and acquiring a right of way 100 feet in width and 1,127 feet in length, comprising about two and 587/1000ths (2.587) acres of land belonging to petitioner and is threatening to go upon and is about to go upon said land and construct thereon an embankment and railroad track or tracks and is about to extend, construct and operate said line of railroad and to engage in transportation under the Interstate Commerce Act and the Transportation Act of 1920 by means of such line of railroad, without having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of the said line of railroad; that said line of railroad is not a spur, industrial, team, switching or side track or a street, suburban or interurban electric railway within the meaning of Paragraph (22) of Section 1 of said Interstate Commerce Act, as amended, but is a terminal railway for the transportation of freight

as a common carrier for hire. Petitioner alleges, on information and belief, that neither the present nor future public convenience or necessity require or will require the construction or operation of said line of railway.

That this is a suit arising under the Constitution and Laws of the United States, that petitioner is a party at interest herein, and that unless the respondent shall be enjoined and restrained from prosecuting said condemnation suit and from constructing, maintaining and operating said line of railway upon and across petitioner's property, which it requires for its own corporate purposes, petitioner will suffer great and irreparable damage, for which it has no remedy at law.

That respondent is actively preparing to press its condemnation suit to trial and to construct, maintain and operate said railway upon and across petitioner's property and that unless immediately restrained and prevented therefrom, its purpose will be accomplished before said cause or petitioner's application for an injunction can be set down and heard. Petitioner prays for a temporary restraining order and, upon hearing, for a perpetual injunction restraining and enjoining the respondent, its attorneys, officers, agents, servants and employees from prosecuting said condemnation suit, and from constructing, maintaining or operating the railroad aforesaid upon or across the property of petitioner.

The bill was duly verified.

Respondent, in its answer, admits the allegations with respect to the incorporation and residence of the parties and that respondent is authorized by its charter to construct, own, maintain and operate a terminal railway as a common carrier and with power of emi-

nent domain. It alleges that "it is wholly and solely an intrastate railroad company and within the State of Texas." It alleges that condemnation suit was instituted, report of the commissioners made and filed, double the amount of the award of the commissioners was deposited in court, and a bond filed pursuant to the State law, all of which it alleges occurred prior to the institution of the suit. It alleges that after the institution of the suit, being unrestrained by any order or writ of the District Court, it constructed its track over and along the property of the petitioner and sets up that, therefore, the issues involved in the suit have become moot and present no ground for equitable relief. It alleges further that it was not and is not in any way engaged in the transportation of commodities as a common carrier—that is, that its operations have not yet begun.

(3) *Trial of the cause and result thereof*: Petitioner's prayer for a temporary restraining order was denied. The cause was set down for hearing and heard on application for an interlocutory injunction and the prayer for such injunction was denied. The cause was heard on the merits on July 15, 1925, when full proofs were taken.

The evidence disclosed without conflict that respondent was and is incorporated as a common carrier under the general laws of the State of Texas and that upon its completion and operation it must of necessity transport interstate as well as state commerce and thereupon be and become subject to the Interstate Commerce Act. That respondent had not applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the construction or operation of its railroad and that the Interstate Commerce Commission had not issued a

certificate of public convenience and necessity—in short, that respondent had not attempted to comply with the provisions of the Interstate Commerce Act, as amended. It disclosed that prior to the filing of the bill respondent had procured from special commissioners appointed by the County Court at Law of Harris County, Texas, an award of damages to be paid to petitioner for the taking of petitioner's lands for the purposes of respondent's business; that petitioner had thereupon deposited in the County Court double the amount of said award and had filed the bond required by the State statute (Title 52, Revised Statutes of Texas, 1925) and that the cause was thereupon appealed to the County Court for trial *de novo;* that after the filing of the bill and after respondent had notice thereof but before it was served with process, under cover of darkness, respondent had constructed its line of railroad across said property, but that the operation of said railroad had not been begun.

On September 26, 1925, the Court handed down and caused to be filed its opinion holding that no certificate of public convenience and necessity is required to be obtained by a new railroad corporation which has not actually engaged in the transportation of interstate freight or passengers until said corporation shall have completed its line of railroad and begun or offered to begin such transportation, and on October 6, 1925, entered a final judgment on the merits, dismissing the bill, but without prejudice to the right of petitioner to thereafter apply for an injunction against the respondent "if its activities in the future should bring it properly within the purview of the Act of Congress known as the Transportation Act of 1920;" that is, after the respondent should have fully completed the construction of its line of

railroad and should actually have begun the transportation of interstate commerce.

III.

Petitioner, in due course, was allowed an appeal from the judgment aforesaid and duly assigned errors (set out in Appendix B.) with prayer for reversal comprehending the grounds of error which will be presented in this Court, and embracing questions submitted in the Courts below.

IV.

The cause was heard by the appellate court, the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, being Cause No. 4718 as docketed in that Court and on January 8, 1927, said appellate court entered its order and judgment affirming the decree of the District Court on the ground that before the decree appealed from was entered a judgment condemning said land was rendered in said condemnation suit, and respondent had constructed its railroad over said land and was operating same—that, therefore, the suit had become a moot one, it being altogether futile to forbid the doing of things which have already been done. Petitioner shows to the Court that, nevertheless, the condemnation suit was and is still pending on appeal and for trial *de novo*, and, while the railroad had in fact been constructed, there is in the bill a prayer for an injunction against its maintenance, and, further, though operation of the railroad had not and has not yet been begun, operation, being a continuing act, might nevertheless be enjoined, though it had been begun as the construction of the line, having been done after the institution of the suit and with notice thereof, may be undone by mandatory injunction. That thereafter,

in due time, petitioner filed in the United States Circuit Court its motion for a rehearing, which said motion was considered and thereafter was, on February 10, 1927, denied and thereupon the judgment in said cause became and was a final judgment.

V.

A certified copy of the entire record of said cause, including the proceedings in said Circuit Court of Appeals, as an exhibit to this petition, in compliance with Rule 35 of this Honorable Court, is herewith furnished.

VI.

Petitioner is advised and believes, and accordingly submits, that said judgment of the United States Circuit Court of Appeals in said cause is erroneous and that this Honorable Court should require said cause to be certified to it for its review and determination in conformity with the provisions of Section 240 of the Judicial Code.

Petitioner maintains, as it submits will become apparent from what follows, that this cause involves questions of law of gravity and of importance, involving the construction of the Constitution and Laws of the United States and the validity and scope of the Laws of the United States which have been decided below in disregard of the validity, purpose and scope of the statutes of the United States; in that said Circuit Court of Appeals for the Fifth Circuit by affirming said decree of the District Court over the grounds of error assigned by petitioner committed errors which petitioner here now assigns in this Court as follows:

1. The trial court erred in holding that Paragraphs (18) to (22) of Section 1 of the Interstate Commerce

Act, as amended by the Transportation Act of 1920, apply only to common carriers by railroad actively engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920 and to new carriers by railroad only when or after they become actively engaged in such commerce.

2. The trial court erred in holding that respondent might lawfully construct, maintain and operate, as a common carrier, a railroad wholly within the State of Texas without first applying to the Interstate Commerce Commission and procuring from it a certificate that the present or future public convenience and necessity require or will require the construction or operation or construction and operation of such additional or extended line of railroad, notwithstanding respondent is chartered to engage in and must necessarily engage in interstate commerce, and notwithstanding respondent's line of railroad extends or will extend from a connection with existing lines of railroad engaged in interstate commerce to certain industrial plants which are already served by carriers engaged in interstate commerce and subject to the Interstate Commerce Act.

Under the opinion and judgment of the trial court above complained of a railroad company, chartered under the general laws of the State of Texas, may construct and operate a line of railroad extending from the eastern to the western boundary of the State, a distance of some 900 miles, intersecting practically every railroad in the State engaged in interstate commerce, depriving such railroads as much as possible of their intrastate business, thereby partially or wholly incapacitating them from economically and efficiently transporting interstate commerce, and thereby placing a great burden on interstate commerce, without

obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity. This may be done so long as the new line so chartered and constructed shall refrain from engaging in interstate commerce—that is, shall refuse to receive and transport any interstate business—freight, passenger, mail or express — notwithstanding it is chartered as a common carrier, that is, as a carrier of all business, both state and interstate, which may be tendered it with the lawful charges, and notwithstanding it is clear that the railroad is in fact intended, as soon as its construction shall have been completed, to be used in interstate commerce. We cannot conceive that this is the law. Such view is certainly wholly inconsistent with the great principles laid down by this Honorable Court in *Dayton-Goose Creek Railway Company vs. United States,* 263 U. S., 169; *Railroad Commission of California vs. Southern Pacific Company,* 264 U. S., 331; *State of Colorado vs. U. S.,* 271 U. S., 153, and *Texas and Pacific Railway Company vs. Gulf, Colorado & Santa Fe Railway Company,* 273 U. S., 266.

3. The United States Circuit Court of Appeals erred in refusing to pass upon the merits of the case and in holding that all issues presented by petitioner's bill had become moot, although the bill prayed not only for a writ of injunction, enjoining and restraining the respondent therein, its attorneys, officers, agents, servants or employees from prosecuting a condemnation suit that was then, and now, pending in the County Court at Law of Harris County, Texas, but also from constructing, maintaining and operating the terminal railroad upon or across the property of complainant therein.

4. The finding of the United States Circuit Court

of Appeals "that before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit and appellee had constructed its railroad over said land and was operating the same" finds no support in the record, for the reason that the condemnation suit was then pending in the County Court at Law of Harris County, Texas, and is still pending in said Court, and respondent was not operating or attempting to operate its road over and across the lands of the petitioner at the time the case was tried in the District Court of the United States.

5. The United States Circuit Court of Appeals erred in holding, "as the only relief prayed for was action by the Court restraining the doing of things which had been done since this suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done." The undisputed facts, as disclosed by the record, show that respondent had filed a condemnation suit against petitioner; that the commissioners had made an award; that petitioner immediately appealed to the County Court at Law of Harris County, Texas, where said condemnation suit is now pending; that when the case was tried in the United States District Court the contention that the issues raised were moot was not seriously made; that at the time the case was tried in the United States District Court, as well as at the time of the hearing in the United States Circuit Court of Appeals, respondent was not operating its line as a railroad over and across the land of the petitioner, and petitioner's bill was for an injunction to restrain respondent from further prosecuting said condemnation suit, which was then pending in the County Court at Law of Harris County, Texas, and, as well, to restrain respondent from constructing, maintaining and operating a line of

railroad over and across the land of petitioner. The mere construction of the roadbed and track over and across the petitioner's land, prior to the time the case was tried in the United States District Court, should not deprive petitioner of the right to have the Court pass upon the merits of the case or to issue its injunction restraining respondent from further prosecuting its condemnation suit, then pending, petitioner protesting in the County Court that respondent had no right to further prosecute the condemnation suit until it procured from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require, the construction or operation, or construction and operation of such road over and across the land of the petitioner.

As to the condemnation suit: Certain preliminary steps had been taken under which respondent was authorized by the law of Texas, though, in the absence of a certificate of public convenience and necessity, not by the laws of the United States, to go upon petitioner's property and construct its railroad thereon. Trial in the State Court on appeal from the award of the commissioners is *de novo* and the fact that certain proceedings had been had and completed before the commissioners affords and can afford no just reason why further prosecution of the suit should not be enjoined. The track was built *pendente lite* and with notice of the suit. If the track was, as we contend is the case, unlawfully and wrongfully constructed, the Court may and should, by an appropriate order, restore the original condition and not declare the issues moot. An injunction was sought against the maintenance of the track as well as against its operation. It is well settled that where acts and injury are continuing in their nature,

as are both maintenance and operation, an injunction will issue.

However, far from contending, as the Circuit Court of Appeals found in its opinion, that operation of the track had already been begun, respondent vigorously denied in its brief that operation had been begun and it has presented no reason why operation should not be enjoined, save and except that the Act of Congress is too weak to reach it.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings in said Circuit Court of Appeals in the said cause, entitled "Texas and New Orleans Railroad Company, Appellant, versus Northside Belt Railway Company, Appellee," No. 4718 on its docket, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code, and that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the Circuit Court of Appeals, and every part thereof, may be reversed by this Honorable Court and such relief granted as is appropriate to the cause.

TEXAS AND NEW ORLEANS
RAILROAD COMPANY,

By H. M. Garrard
Geo. F. Garrison
J. L. Jalonick
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
THE STATE OF TEXAS,
COUNTY OF HARRIS.

J. H. Tallichet, being duly sworn, says that he is one of the Attorneys and of Counsel for the petitioner named in the foregoing petition for certiorari and is authorized to act for it in this behalf, including the making of this affidavit; that he has read said petition by him subscribed and that the facts therein stated are true to the best of his knowledge, information and belief, but for greater certainty he prays reference to the record herewith presented.

J. H. Tallichet

Sworn to and subscribed before me on this, the 25th day of April, 1927. Witness my hand and seal of office.

C. G. Kehrer

Notary Public in and for Harris County, Texas.

UNITED STATES OF AMERICA,
THE STATE OF TEXAS,
COUNTY OF HARRIS.

I hereby certify that I have examined the foregoing petition and that in my opinion the cause is one in which the writ of certiorari as prayed for may properly be granted by this Court.

J. H. Tallichet

Attorney for Petitioner.

APPENDIX A.

Paragraphs (18) to (22) of Sec. I, Interstate Commerce Act as amended by Transportation Act of 1920.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or

the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a pro-

ceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX B.

ASSIGNMENTS OF ERROR.

Filed Oct. 1, 1925.

In the District Court of the United States for the Southern District of Texas.

(Title Omitted.)

Now comes the appellant Texas & New Orleans Railroad Company, by Garrison & Watson, its attorneys and in connection with its petition for appeal, says that in the record proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of appellant, to-wit:

I.

The Court erred in not holding that the bill of complaint as well as the evidence introduced upon the trial states facts, sufficient to constitute a cause of action and in denying and refusing appellant's petition of an injunction.

II.

The Court erred in not finding the following facts: That the Eastern terminals of the North Side Belt Railway Company, which begins at the Northwest corner of the American Petroleum Company's property and connecting with the North end of the industrial track of the American Petroleum Company and extending south to the ship channel; that the Industrial track owend by J. S. Cullinan, President of the North Side Belt Railway Company, which is carried in the name of "John Doe," forms a part of the North Side Belt Railway Company and extends from the Eastern terminus of the North Side Belt Railway Company to a connection with the industrial track of the Galena Signal Oil Company, which industrial track connects

with the Texas & New Orleans Railroad Company where interstate freight is both received and delivered; that that a portion of the North Side Belt Railway Company, beginning with the industrial track owned by the Galena Signal Oil Company and extending East to where it connects with the track of the American Petroleum Company, has been used and was being used prior to the filing of appellant's complaint herein, for the purpose of receiving and delivering interstate freight to and from the Texas & New Orleans Railroad Company.

III.

The Court erred in holding that Sections 18 to 22 of the Transportation Act of 1920 do not apply to the construction of a new road, but only apply to common carriers engaged in interstate commerce at the time of the enactment of the Transportation Act of 1920.

IV.

The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character.

V.

The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business.

VI.

The Court erred in holding that the construction of the the North Side Belt Railway neither directly or indirectly burdens or interferes with, affects or is affected

by interstate commerce until the completion of said road and until it actually begins the handling of interstate commerce.

VII.

The Court erred in decreeing that the plaintiff was not entitled to the injunction prayed for, for the reason that the Transportation Act of 1920 did not apply to a road that was being constructed and until the completion of the road, and it was actually engaged in interstate commerce.

VIII.

The decree is against the manifest weight of the evidence.

IX.

The decree is contrary to law.

X.

The Court erred in refusing to grant the application of complainant, Texas & New Orleans Railroad Company, for a temporary injunction restraining the respondents, North Side Belt Railway Company, et al., from building or continuing to build or construct its road bed and track, as prayed for in complainant's original petition pending said appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at Fort Worth, Texas.

Wherefore, appellant prays that the decree of the United States District Court for the Southern District of Texas may be reversed, and that this Honorable Court grant the writ of injunction prayed for, or direct said District Court to grant said writ.

TEXAS & NEW ORLEANS RAILROAD COMPANY,
By BAKER, BOTTS, PARKER &
GARWOOD,
GARRISON & WATSON,
Its Attorneys.

SUPPLEMENTAL ASSIGNMENTS OF ERROR.

Filed Oct. 6, 1925.

In the District Court of the United States for the Southern District of Texas.

(Title Omitted.)

Now comes the plaintiff, Texas & New Orleans Railroad Company and files this its Supplemental Assignment of Error.

The Court erred in refusing plaintiff's application for a stay order, pending final determination of this cause in the Circuit Court of Appeals.

BAKER, BOTTS, PARKER & GARWOOD,
GARRISON & WATSON,
Attorneys for Plaintiff.

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No.....

IN THE

Supreme Court of the United States

TEXAS AND NEW ORLEANS RAILROAD COMPANY,

Petitioner,

versus

NORTHSIDE BELT RAILWAY COMPANY,

Respondent.

BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the District Court in this cause is reported: Texas & N. O. R. R. Co. vs. North Side Belt Ry. Co., 8 Federal Reporter (2nd Series) 153; of the Circuit Court of Appeals: Texas & N. O. R. R. Co. vs. North Side Belt Ry. Co., 16 Federal Reporter (2nd Series) 782.

The judgment sought to be reviewed is that of the Circuit Court of Appeals for the Fifth Circuit (affirming a judgment of the District Court for the Southern District of Texas, Houston Division, entered October 6, 1925,—R. 19-20.) which said judgment was rendered January 8, 1927 (R.——.) and became a final judgment by the overruling of petitioner's motion for rehearing on February 10, 1927. (R.——.)

The specific claim made by petitioner in the courts below was that the taking of petitioner's property under a State statute of eminent domain, and the construction, maintenance and operation thereon by respondent of a railroad, which under its charter is obligated to and which inevitably will engage in interstate commerce, is in violation of paragraph (18) of Section 1 of the Interstate Commerce Act, as amended, and should be enjoined at the suit of the property owner. (R. 3-9.) The Court overruled said claim. (R. 15-19.)

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code.

This is a suit which was instituted in the District Court of the United States for the Southern District of Texas, Houston Division, by Texas and New Orleans Railroad Company against Northside Belt Railway Company to enjoin and restrain the latter, which was engaged in the construction of a railroad without having obtained from the Interstate Commerce Commission a certificate of public convenience and necessity, from (1) condemning, under a State statute, certain property of complainant, (2) constructing its railroad on said property, (3) maintaining, and (4) operating said railroad on said property. (R. 3-9.)

The Court refused to enter a temporary restraining order prayed for by petitioner; and, having set the matter down for hearing, denied the prayer for an interlocutory injunction. On trial of the case on the merits, full proofs having been taken, the Court denied the application for an injunction and dismissed the bill,—all on the ground that a newly created railroad company, whose line lies wholly within a State has the right to acquire property by condemnation, build its railroad, maintain and operate it without regard to the

Federal statutes, and becomes subject to said statutes only after it has actually engaged or offered to engage in interstate commerce,—this in the face of the statute which requires a certificate of public convenience and necessity as a condition precedent to the construction, extension and operation of a railroad. (R. 15-20.)

Petitioner appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which erroneously affirmed the judgment of the Court below, holding that the case had become moot.

The assigned errors here intended to be urged are:

1. The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character. (R. 26.)

2. The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business. (R. 26.)

3. The decree is contrary to law. (R. 27.)

4. The cause has not become moot.

Petitioner now seeks a writ of certiorari, petition for which is filed herewith. In support thereof it respectfully submits the following brief reference to some of the decisions and to the statutes which govern the matter.

ARGUMENT.

I.

The Interstate Commerce Commission has continuously asserted its jurisdiction under the Interstate Commerce Act to give or withhold its permission for the

construction of new lines wholly within the boundaries of a particular state and that jurisdiction has not hitherto been challenged.

Construction of line by North & South R'y. Co., 86 I. C. C. 463;

Construction of line by Jefferson & Southwestern R'y. Co., 76 I. C. C. 778 (Application denied);

Construction of line by Mississippi R'y 82 I. C. C. 698;

Application of Golden Belt Ry., 771 I. C. C., 232 (Application denied);

Application of National Line R. R. Co., 71 I. C. C., 556 (Application denied);

Application of Longview, Portland & Northern, 79 I. C. C. 805;

Application of Shreveport & Northeastern R. R., 71 I. C. C. 586 (Application denied);

Application of Kansas, Oklahoma & Southern R. R., Co., 71 I. C. C. 130;

Application of Ft. Wayne Union R. R. Co., 79 I. C. C. 442;

Application of Uvalde & Northern R'y, 67 I. C. C. 204; 67 I. C. C. 554;

Application of Golden Belt R. R. of Kansas, 67 I. C. C., 370;

Application of Coon Bayou & Arkansas City R'y, 65 I. C. C., 701;

Application of Michigan Northern R. R., 65 I. C. C. 480.

Paragraph (18) of Section 1 of the Interstate Commerce Act is, in part, as follows:

> "After ninety days after this paragraph takes effect, no carrier by railroad, subject to this act, shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation

> under this act, over, or by means of, such additional or extended lines of railroads, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require, or will require, the construction, or operation, or construction and operation, of such additional or extended lines of railroads; and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad or the operation thereof unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

An administrative ruling by a government department long adhered to is given weight by the Courts in determining the proper interpretation to be placed upon a statute.

In Kern River Company v. U. S., 257 U. S., 147, 66 L. Ed. 175, 179, Mr. Justice Van Devanter, speaking for the Court, said:

> "Even if the meaning of a Federal Statute were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it." Citing Logan v. Davis, 233 U. S., 613, 58 L. Ed. 1121, 1128, in which the Court referred to: 'The settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons'."

II.

In order to determine whether paragraph (18) of Section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 was intended to apply only to roads existing at the time of its passage,

it may be helpful to examine the authorities to ascertain the purpose of the passage of this Act.

In the case of Dayton-Goose Creek R'y Co., vs. United States, 263 U. S. 169, Chief Justice Taft said:

> "In the New England Divisions Case, 261 U. S. 184, it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.
>
> "It was insisted in the two cases referred to and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately

concerned, as well as the public at large, and to promote its growth and insure its safety."

In the case of Railroad Commission of California v. Southern Pacific Co., 264 U. S. 331, the Supreme Court again had under the consideration Sections 18 to 22 of the Transportation Act of 1920. The Railroad Commission of California sought to require certain railroads entering the City of Los Angeles to construct a Union Depot. The contention was made on the part of the railroad companies that under the Transportation Act the Railroad Commission of California was without authority to compel them to build a Union Depot unless a permit was procured from the Interstate Commerce Commission, it was contended that paragraphs 18 to 22 of Section 402 of the Transportation Act applied only to the extension of railroads and did not apply to the building of Union Depots. In passing upon this question, Chief Justice Taft said:

"Section 405, amended Section 3 of the Interstate Commerce Act (Comp. St. Ann. Supp. 1923, Par. 8565), provides in its third paragraph that all carriers shall afford all reasonable facilities for the interchange of traffic between their respective lines and for forwarding and delivering passengers. Paragraph 4 provides that the Commission may, in the public interest and without impairment of a carrier's power to handle its own business with its terminal facilities, require the use of its terminal facilities, including its main line track or tracks for a reasonable distance outside of its terminal for another carrier or carriers, upon such terms as may be agreed upon by the parties, fixed by the Commission or determined by suit as in condemnation proceedings.

"It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce

Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property, in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier a union station or depot.

"The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in Section 439 of the Transportation Act (Comp. St. Ann. Supp. 1923, Par. 8592a), whereby the Interstate Commerce Act is amended by insertion of Section 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds, or other evidence of indebtedness, and forbids approval unless the Commission finds that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier, and will not impair its ability to perform that service." * * * * * *

"We are advised by statements at the bar that after the California Supreme Court handed down its decision in this case, the City of Los Angeles filed a petition with the Interstate Commerce

Commission, asking for an order to provide, maintain, and use a union station, that a hearing followed, and that, pending the decision in this court, the matter is held under consideration.

"For the reasons given, we think the course taken by the city of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the Transportation Act, the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railway Commission."

Reference is also made, in this connection to the recent cases:

State of Colorado vs. U. S., 271 U. S. 153.
Tex. & Pac. Ry. Co., vs. Gulf, C. & S. F. Ry. Co., 273 U. S. 266.

III.

It is submitted that the United States Circuit Court of Appeals erred in holding that all issues presented in the bill of complaint by petitioner had become moot. The Court said:

"It is disclosed by the record that no restraining order or interlocutory injunction was issued, and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee has constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which had been done since the suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done."

This finding of fact by the United States Circuit Court of Appeals in view of the record, is rather re-

markable. The undisputed facts, as disclosed by the record, show: That on or about the 8th day of June, 1925, respondent duly filed proceedings for the purpose of condemning a right-of-way across the land of petitioner; that such proceedings were duly prosecuted, resulting in an award to complainant of Seven Hundred Fifty ($750.00) Dollars; that following the condemnation proceedings, respondent deposited with the County Clerk of Harris County, Texas, the sum of $1500.00, double the amount of the award, and became entitled, under the State Statute to take possession of the land in question on the 13th day of June, 1925.

That immediately following the award of the Commissioners, petitioner gave notice of appeal, under and by virtue of the Statute of the State of Texas, to the County Court at Law of Harris County, Texas, where said condemnation proceedings are now pending, awaiting the final result of this suit. That about the time of the hearing before the Commissioners, petitioner filed and presented to the United States District Judge, a bill for injunction, praying that respondent be temporarily and on hearing, perpetually, restrained from prosecuting its condemnation suit, as well as from constructing, maintaining, and operating its railroad over and across the land of petitioner; that the United State District Judge refused to grant a temporary injunction, but set the case down for hearing, requiring respondent to appear within five days and show cause why said injunction should not be granted.

That respondents, immediately after being advised of the fact that said temporary injunction had been denied by the court, procured an extra force and built its track over and across petitioner's land, completing

same at about 11:30 o'clock, P. M. on June 13th, 1925.

The condemnation proceedings in the County Court at Law where they will be tried *de novo*, were pending at the time the case was tried in the United States District Court, at the time when the opinion was rendered by the United States Circuit Court of Appeals for the Fifth Circuit. They are still pending, and if the relief prayed for herein is granted, must fall, with the rights which respondent is wrongfully exercising under them. (R. 33.)

The work of constructing the track, so hurriedly done, may and should be undone.

In Corpus Juris, Volume 32, Page 24, When An Act Has Been Completed Pendente Lite, the rule is laid down as follows:

> "Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things, and thereby prevent the gaining of an advantage by reason of the wrongful act, provided plaintiff has been guilty of no wrongful acquiescense or delay. Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the statutes, or to grant such other relief as may be proper under the particular circumstances of the case."

In the case of St. Louis S. F. Railroad Company vs. Cross, 171 Federal, it was held:

> "It is also insisted in support of the demurrer that the defendant Meyer actually made the declaration against the complainant, revoking its authority in the state. In the amended bill it is alleged that the signing of the instrument was 'subsequent to the institution of the suit.' It

bears date one day later than that of the filing of the original bill and of the preliminary order restraining its issuance, but on the day of service of the order. Presumably it was executed before the order became effective or was served. It does not appear that 'a foreign domicile' was alleged in the petition for removal or was the ground of the declaration; but assuming that such domicile was alleged, and the fact certified to the Secretary as contemplated in the legislative act, still must the relief prayed for be denied because the declaration shortly preceded the time when the order became effective or was served? The point is highly technical and goes to an avoidance of a decision on the merits. It is not available. This court had acquired jurisdiction over the subject-matter of the suit before the defendant acted, and he could not therefore prejudice or defeat the rights of the complainant. In such a case a court of equity has ample 'power to compel by mandatory injunction the restoration of the former conditions of things,' and prevent the gaining of advantage by reason of the wrongful act. 22 Cyc. 743; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; High on Injunctions (4th Ed.) No. 5a; Bishpam's Prin. Eq. 400; Gibson's Suits in Chancery, No. 824. The demurrer will be overruled."

The railroad having been wrongfully and illegally constructed on petitioner's property, its maintenance may be enjoined, and in any event, operation being a continuing act, may be enjoined, even though begun prior to the trial. In fact operation has not yet been begun. Los Angeles Water Co. vs. Los Angeles, 88 Fed. Rep. 720; Surrall vs. Am. Tel. Co., 224 Ill. 266.

That the case is not moot, see the following authorities:

"A moot case is one which seeks to determine an abstract question which does not arise upon

existing facts or rights." Adams vs. Railroad Company, 44 Lawyer's Reports, Annonated, 273.

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. Ex-parte Steele, 162 Fed. 694, 702."

"The fact that a suit may be a friendly one would not of necessity render it a 'moot case,' which is defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights. State v. First Catholic Church of Lincoln, 128 N. W. 657, 658, 88 Neb. 2."

"A 'moot case' is one which seeks to determine an abstract question which does not rest upon existing facts or rights.' 'It is universally understood by the bench and bar . . . . . that a moot case is one which seeks to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy.' Where a request is made of a public officer to perform an act under a statute, and he, although believing that the law requires its performance, refuses because of a doubt on the subject and because he wishes the question to be quickly and finally settled by the decision of a court, a proceeding brought by the state to compel such action on his part is not fictitious. State v. Dolley, 108 Pac. 846, 82 Kan. 533 (quoting Adams v. Union Railroad Co., 42 Atl. 517, 21 R. I. 140, 44 L. R. A. 273; Ex-parte Steele, 162 Fed. 694, 701)."

It is respectfully submitted that the petition should be granted.

H. M. GARWOOD,
JOHN T. GARRISON,
J. H. TALLICHET,
Attorneys for Petitioner.

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(32654)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1927, No. 231.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Petitioner,

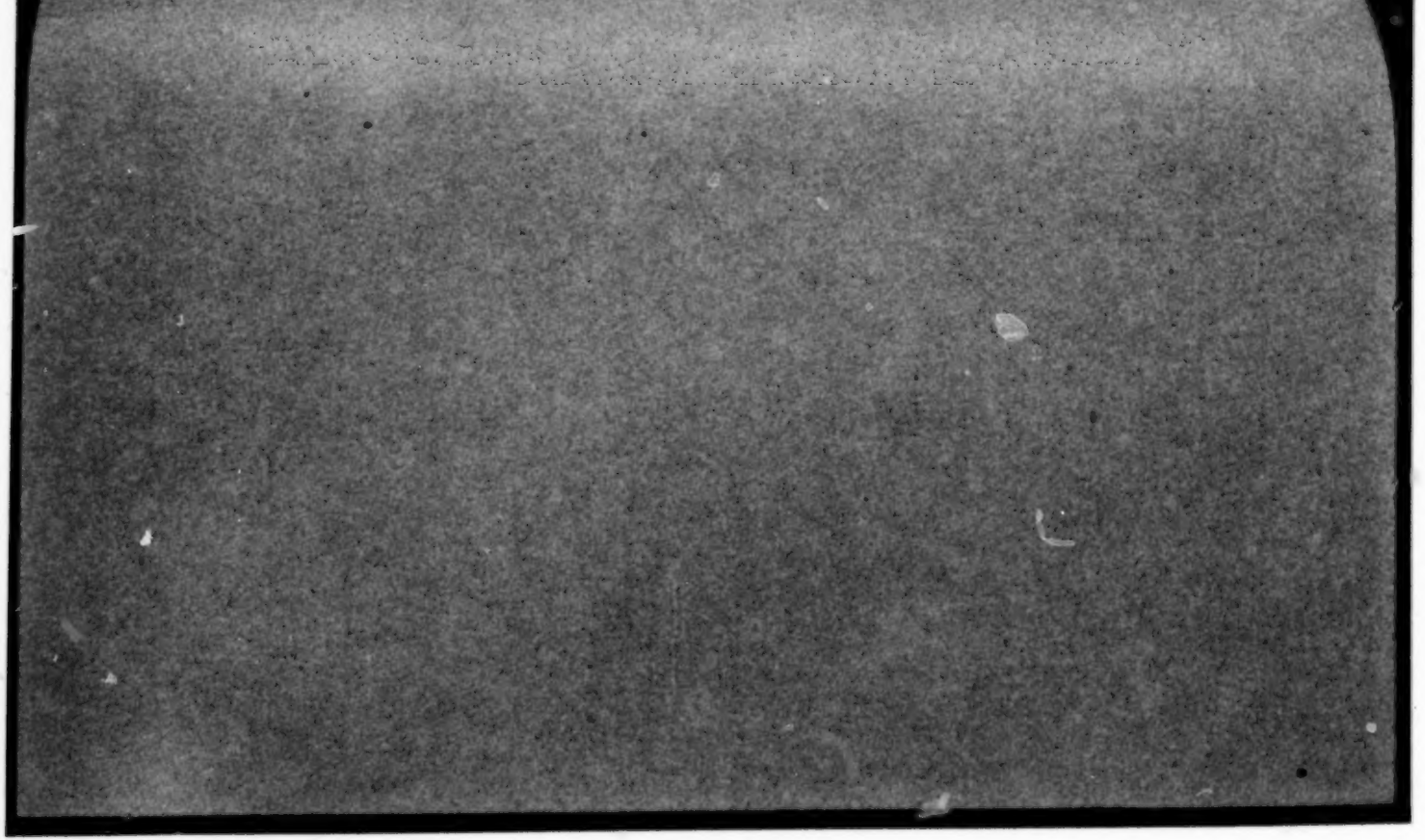
vs.

NORTHSIDE BELT RAILWAY COMPANY.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief For
TEXAS AND NEW ORLEANS RAILROAD COMPANY.

H. M. GARWOOD,
J. H. TALLICHET,
Solicitors.
Houston, Texas.



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I With the passage of the Transportation Act, 1920, a new railroad policy was introduced into federal legislation — the ensuring of adequate transportation service by means, among others, of preventing construction of unnecessary railroads. 9

II Northside Belt, having undertaken construction and operation of its railroad without complying with Federal requirements, petitioner herein, being a party in interest, is authorized to institute and maintain this suit in the United States District Court for the Southern District of Texas, Houston Division. Neither the jurisdiction of the Court nor the right of the petitioner herein to maintain the suit have been challenged..... 12

III Under the Commerce Clause of the Constitution the Congress has plenary power over interstate commerce and its instrumentalities, including plenary power over construction and operation of railroads which are created and must operate as instrumentalities of such commerce, or which will affect such commerce or its instrumentalities 13

IV Congress has exercised this plenary power and has dealt with almost the entire field of transportation by railroad, in which interstate and state commerce are inextricably commingled. It has dealt with and defined the conditions under which any new railroad or extension of a railroad may be constructed or operated in the United States, and has provided that there shall be no such construction or operation except under certificates of public convenience and necessity from the Interstate Commerce Commission. 14

V Northside Belt is a common carrier charged with the duty of transporting interstate as well as state commerce. It was designed and intended to transport interstate commerce and must in-

evitably transport such commerce when or if it shall engage in the transportation of any commerce. Its line may not be lawfully constructed or operated without a certificate of public convenience and necessity issued by the Interstate Commerce Commission. 29

VI Paragraphs (18) to (22) of Section 1 of the Interstate Commerce Act should be so construed as to accomplish the purpose of the Congress—affirmatively to build up a system of railways prepared to handle interstate traffic and to enable the owners of railways to earn enough to maintain their properties in a state of efficiency. To permit unauthorized and unnecessary conconstruction and operation of railroads will defeat this purpose..... 31

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(32654)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1927, No. 231.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Petitioner,

vs.

NORTHSIDE BELT RAILWAY COMPANY.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

Brief For

TEXAS AND NEW ORLEANS RAILROAD COMPANY.

Opinions delivered in this Cause in the Courts below:

Texas and N. O. R. R. Co. v. Northside Belt Ry. Co. (District Court), 8 Fed. (2nd) 153.
Texas and N. O. R. R. Co. v. Northside Belt Ry. Co. (C. C. A.) 16 Fed. (2nd), 782.

Grounds of Jurisdiction.

The judgment sought to be reviewed is that of the Circuit Court of Appeals for the Fifth Circuit, rendered January 8, 1927 (R. 50), which affirmed a judgment of the Dis-

trict Court of the United States for the Southern District of Texas, Houston Division, entered October 6, 1925 (R. 13-14). Said judgment of the Circuit Court of Appeals became final by the overruling of petitioner's motion for rehearing on February 10, 1927 (R. 51). This Court granted the petition (filed April 29, 1927) of Texas and New Orleans Railroad Company, plaintiff and appellant below, for writ of certiorari, June 6, 1927 (R. 51).

The specific claim advanced by petitioner in the Courts below was that the taking of petitioner's property, under a State statute of eminent domain, and the construction, maintenance and operation thereon by Northside Belt Railway Company of a railroad,—said Railway Company being obligated under its charter to engage in interstate commerce, and it being intended and being inevitable that it should engage in such commerce,—without first having obtained from the Interstate Commerce Commission a certificate of public convenience and necessity as provided in Paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act, as amended, is in violation of said Interstate Commerce Act and of said paragraphs thereof, and should be enjoined at the suit of the property owner (R. 2-6). The District Court overruled said claim and held that said statute was inapplicable unless and until the new Railroad Company, constructing or owning a railroad wholly within a State should actually have engaged or offered to engage in interstate commerce (R. 10-13).

The same claim was advanced in the Circuit Court of Appeals (R. 17-19). That Court held that because it appeared that, no restraining order or interlocutory injunction having been issued, a judgment condemning the land had been rendered, the railroad constructed across the land involved in the suit, and operation thereof begun, the suit had become a moot one (R. 49-50). This holding was challenged by petitioner in its petition for rehearing,

but the petition was denied (R. 50-51).

Jurisdiction of this court is invoked under Section 240 of the Judicial Code.

Statement of the Case.

The suit was instituted June 13, 1925, in the District Court of the United States for the Southern District of Texas, Houston Division, by Texas and New Orleans Railroad Company, a Texas corporation and a common carrier subject to the Interstate Commerce Act, as plaintiff, against Northside Belt Railway Company, a Texas Corporation created and organized for the purpose of operating a terminal railroad wholly within the State of Texas as a common carrier of freight for hire, as defendant, to enjoin and restrain the defendant, which was engaged in the construction of a railroad without having obtained from the Interstate Commerce Commission a certificate of public convenience and necessity in accordance with Paragraphs (18) to (22), inclusive, of Section 1 of the Interstate Commerce Act from (1) condemning under a State statute, for the purposes of its incorporation, certain land, the property of plaintiff, (2) constructing its railroad on said property, (3) maintaining and (4) operating said railroad on said property. It was alleged in the bill for injunction that the railroad of the Northside Belt is not a spur, industrial, team, switching or side track, nor a street, suburban or interurban electric railway within the purview of Paragraph (22) of Section 1 of said Act. Plaintiff is expressly empowered to maintain this suit as a party in interest by Paragraph (20) of Section 1 of the Act. Plaintiff, in addition to its prayer for a perpetual injunction, prayed, with appropriate allegations, for a temporary restraining order (R. 2-6).

The Court refused to enter a temporary restraining order, and having set the matter down for hearing, denied the prayer for an interlocutory injunction. At this time

a report had been filed by the commissioners in condemnation, awarding damages for the condemnation of the land, and Texas and New Orleans Railroad Company had appealed from said award in accordance with the terms of the State statute. The railroad of the Northside Belt was thereupon hurriedly built on petitioner's land, and completed across it about 11 p. m. on the date of institution of the suit (R. 21).

The Northside Belt filed its answer on July 15, 1925, admitting that it is a railroad corporation created under the General Laws of the State of Texas, having the corporate power and for the purpose of constructing, owning, maintaining and operating a terminal railway wholly within Harris County, Texas, asserting its right under the laws of Texas to condemn said property for the purposes of its incorporation, and, that it had constructed its railroad thereon after institution of the suit, alleging that it is solely an intrastate railroad company not yet engaged in business, and is not subject to the Interstate Commerce Act (R. 7-10).

The case was tried on its merits and full proofs taken on July 15, 1925 (R. 13). On September 26, 1925, the District Court filed its opinion (R. 10-13) denying the application for an injunction and dismissing the bill on the ground that a newly created railroad company whose line lies wholly within a State has the right to acquire property by condemnation, to build its railroad, to maintain it, and to operate it without regard to the Federal Statutes, and becomes subject to said Statutes only after it has actually engaged or offered to engage in interstate commerce. Decree was entered accordingly (R. 13-14).

The evidence without conflict disclosed that the Northside Belt is incorporated as a common carrier to operate a railroad in Harris County, Texas, (R. 32-36) and, as such, was created for the purpose and charged with the duty of transporting interstate as well as state commerce;

that, as shown by the testimony of its President, it was intended and designed to engage in interstate commerce, and that it must inevitably engage in interstate commerce as soon as it engages in any commerce at all (R. 25, 26 and 28). No certificate of public convenience and necessity, in accordance with the terms of the Federal Statute, has been applied for or obtained by it (R. 36-37). It disclosed that the Northside Belt had, on June 8, 1925, instituted a suit under the Texas statute for the purpose of condemning a right of way across the property of Texas and New Orleans Railroad Company described in the bill; that immediately prior to the filing of said bill commissioners, appointed under the Texas statute, had fixed the damages of petitioner for the taking of its said property; that the amount required by the State law had been deposited by the Northside Belt with the Clerk of the Court in which the condemnation suit was pending, a bond required by the State law had been filed, and that the Northside Belt had thereby acquired such right as it could solely under the State statute to take possession of said land. That after the filing of the bill, and with notice thereof, the Northside Belt had taken possession of said land and under cover of night had constructed its railroad across same. That petitioner had taken an appeal under the State statute from the award above referred to (R. 21). In this appeal the petitioner is entitled to trial *de novo* in the County Court of Harris County, Texas. There is no evidence that the Northside Belt has ever operated its railroad over said property. On the contrary, all the evidence is to the effect that it has not (R. 27).

Plaintiff applied to the District Court for a restraining order to remain in effect pending its appeal (R. 14-15) but said application was denied (R. 16). An appeal was thereupon taken to the Circuit Court of Appeals for the Fifth Circuit (R. 16-20).

The Circuit Court of Appeals affirmed the judgment of the Court below, holding that the suit had become moot (R. 49-50).

Petitioner, in due time, on April 29, 1927, filed and presented to this Court its petition for a writ of certiorari and brief in support of same, which said petition was granted on June 6, 1927.

Specification of Assigned Errors here Intended to be Urged.

1. The Court erred in holding as a matter of law that the Transportation Act of 1920 does not apply to new carriers whose line of railroad lies wholly within the State until the new carrier becomes impressed with an interstate character (R. 18).

2. The trial Court erred in holding that the Transportation Act of 1920 does not give to the Interstate Commerce Commission jurisdiction over any railroad constructed, when its railroad tracks lie wholly within the State of Texas, until said railroad is completed and begins doing an interstate business (R. 18).

3. The decree is contrary to law (R. 19).

4. The cause has not become moot.

Summary of Argument.

1. Since May 28, 1920, that is, ninety days after the taking effect of Paragraphs (18) to (22) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, no carrier by railroad, subject to said Act, may lawfully undertake the extension of its line of railroad, or the construction of a new line of railroad, or acquire or operate any line of railroad or extension thereof, or engage in transportation under the Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require, the construction

or operation, or construction and operation of such additional or extended line of railroad.

2. Texas and New Orleans Railroad Company, being a party in interest, that is, the owner of land sought to be condemned and used for the construction, maintenance and operation of the railroad of the Northside Belt, may enjoin in any court of competent jurisdiction such unlawful construction, maintenance and operation. The District Court of the United States for the Southern District of Texas, Houston Division, is a court of competent jurisdiction, inasmuch as the suit is one arising under the Constitution and Laws of the United States, and the domicile of the defendant, Northside Belt, is at Houston, in said Southern District of Texas.

3. Under the Commerce Clause of the Constitution, the Congress has power to regulate commerce with foreign nations, among the several states, and with the Indian tribes; and this power is unlimited, except as prescribed by the Constitution itself. Included in this power is the right to restrict and to regulate the construction and operation of railroads, both state and interstate, which are chartered, as common carriers, to engage in interstate as well as state commerce, which must of necessity engage in all such commerce; as well as to restrict and regulate the construction and operation of railroads if there be, or can be any such, which, though wholly within a state and with the right and duty to engage solely in state commerce, may, by depriving railroads engaged in both interstate and state commerce of part of their business, thereby impose a burden on interstate commerce.

4. The Congress has exercised this power in the enactment of the Interstate Commerce Act and the amendments thereof contained in the Transportation Act, 1920.

5. The Northside Belt is incorporated under the Laws of the State of Texas as a common carrier, is

charged with all the duties and obligations of such common carrier by the law of its creation, including the duty to receive and transport all business, interstate as well as state, which may be tendered it for transportation. It was designed and created for the purpose of engaging in interstate commerce as well as state commerce, and it must inevitably engage in interstate commerce as soon as it engages in any commerce at all. It is, therefore, subject to the Interstate Commerce Act, and is engaged in interstate commerce within the meaning of the Act.

6. The purpose of the Interstate Commerce Act, as amended, is affirmatively to build up a system of railways prepared to handle promptly the interstate traffic of the country, to enable the owners of the railways to earn enough to maintain their properties in such a state of efficiency that they can carry well this burden. To construe the Act as permitting the construction of railroads indiscriminately within the boundaries of States without regard to public convenience and necessity will defeat the purpose of the Act. The Act should be so construed as to effect its purpose.

7. Departmental construction of Federal Statutes is entitled to great weight. The Interstate Commerce Commission has construed this Statute and has continuously asserted its jurisdiction to give or withhold its permission for the construction of new railroads wholly within State lines.

8. The case is not moot. Everything that has been done by the Northside Belt was done in the face of the Statute and in the face, and with full knowledge, of this suit. The work of construction which has been done should be undone. Operation has not been begun and should be prevented.

Argument.

I.

Prior to the enactment of the Transportation Act, 1920, the Congress was principally concerned in the regulation of interstate commerce and its instrumentalities in preventing abuses, particularly those arising from excessive or discriminatory rates. With the passage of said Act, there was introduced into the Federal legislation a new railroad policy, the ensuring of adequate transportation service. To attain it, new rights, new obligations and new machinery were created (*New England Divisions Case*, 261 U. S. 184, 189-190).

In order to ensure adequate transportation service, the Congress charged the Interstate Commerce Commission with the duty of determining, to the end that unnecessary railroads might not be built or operated, whether or not, in any case, the public convenience and necessity required, or would require, the construction or operation of new lines and extensions of existing lines; and with the duty of determining whether or not the public convenience and necessity permitted the abandonment of existing lines of railroad. This purpose was accomplished by the enactment of Paragraphs (18) to (22), inclusive, of Section 1, of the Interstate Commerce Act, as follows:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require

or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than

such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to

the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

It is apparent that the foregoing provisions are applicable to all common carriers by railroad in the United States and that no railroad, or any part thereof, may be constructed or abandoned without a certificate of public convenience and necessity granted by the Interstate Commerce Commission, save and except industrial, team, switching or side tracks located or to be located wholly within one state, and street, suburban or interurban electric railways, which are not operated as a part or parts of a general railroad system of transportation (*Colorado v. United States*, 271 U. S. 153, 164).

II.

Without having complied or attempted to comply with the requirements of the law, the Northside Belt, which was incorporated under the laws of the State of Texas as a common carrier by filing its articles of incorporation in the office of Secretary of State of the State of Texas on March 23, 1925, instituted a condemnation suit under the State statute against Texas and New Orleans Railroad Company for the purpose of condemning, for the purposes of its incorporation, that is: for the construction, maintenance and operation of its line of railroad, certain land, the property of Texas and New Orleans Railroad Company. The domicile of the Northside Belt is in the City of Houston, in the Southern District of Texas. In Paragraph (20) of the Act above set out it is provided

that any construction or operation contrary to the provisions of that Paragraph or of Paragraphs (18) or (19) of said Act may be enjoined by any court of competent jurisdiction at the suit of any party in interest. There can be no doubt that the owner of the property sought to be taken for the purpose of unlawful construction and operation of a railroad is a party in interest within the meaning of the Statute. It is so held in *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 285 Fed. 540, 548. Accordingly, this suit was instituted in the District Court of the United States for the Southern District of Texas, Houston Division. Neither the jurisdiction of that Court, nor the right of Texas and New Orleans Railroad Company as a party in interest to maintain the suit have been challenged.

III.

In Article I, Section VIII, of the Constitution of the United States it is provided:

"The Congress shall have power—

* * *

"3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

* * *

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

In *Gibbons v. Ogden*, 9 Wheaton, 1, it was held by this Court that this power is unlimited except as prescribed by the Constitution itself. That commerce is more than traffic, it is commercial intercourse between nations and parts of nations in all its branches.

In *California v. Pacific Railroad Company*, 127 U. S. 1, 39, quoted with approval in *Dayton-Goose Creek Rail-*

way Company v. United States, 263 U. S. 456, 479, this Court has said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. . . . This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. . . . But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

And this Court has held in *Houston East and West Texas Railway Company v. United States* (the *Shreveport case*), 234 U. S. 342, that wherever the interstate and state transactions of carriers are so related that the government of one involves the control of the other, it is Congress and not the State that is entitled to prescribe the final and dominant rule.

IV.

That Congress has exercised this plenary power so as to deal with almost the entire field of transportation by railroad, in which interstate and state commerce are inextricably commingled, is demonstrated by the terms of the Transportation Act, 1920, and by the following decisions of this Court rendered after the passage of that Act and with respect to many of its provisions.

In the first case decided by this Court under the amended Act, *Wisconsin Railroad Commission vs. C. B. & Q. R. R. Co.*, 257 U. S. 563, the Court, after reviewing some of the changes in the law brought about by the passage of the Act, said:

"It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill.

"Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates', i. e., powers derived from previous amendments

to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce', within the ordinary meaning of those words. . . . . (pp. 585-586).

"It is objected here, as it was in the *Shreveport Case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport Case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce,

such incidental regulation is not an invasion of state authority or a violation of the proviso. . . . . (p 588)

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field.

"In *Minnesota Rate Cases*, 230 U. S. 352, where relevant cases were carefully reviewed, it was said, p. 399: 'The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that

the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.' " (pp. 589-590)

In *New England Divisions Case*, 261 U. S. 184, the Court said:

"Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed.

"The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what traffic would bear. A five per cent. increase had been granted in 1914, *Five Per Cent. Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent. in 1917, *Fifteen Per Cent. Case*, 45 I. C. 303; twenty-five per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tol-

erate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line." (pp. 189-191).

Dayton-Goose Creek Railway v. United States, 263 U. S. 456, involved the validity of the recapture provisions of the Transportation Act, 1920 (Section 422 of that Act, which added Section 15a to the Interstate Commerce Act). In that case the Court said:

"This Court has recently had occasion to construe the Transportation Act. In *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563, it was held that the act in seeking to render the interstate commerce railway system adequate to the country's needs had, by Sections 418 and 422, conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the *New England Divisions Case*, 261 U. S. 184, it was held that

under Section 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

"In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issues of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to

the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. *The Daniel Ball*, 10 Wall. 557, 564; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697; *California v. Pacific R. R. Co.*, 127 U. S. 1, 39; *Wilson v. Shaw*, 204 U. S. 24, 33; *Second Employers' Liability Cases*, 223 U. S. 1, 47; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529. Mr. Justice Bradley, speaking for the Court in *California v. Pacific R. R. Co.* (p. 39), said:

" 'The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. . . . . This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. . . . . But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject.'

"If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service. . . . . (pp. 477-479)

"In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise

such control has been clearly established. *Minnesota Rate Cases*, 230 U. S. 352, 432, 433; *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, 477; *The Shreveport Case*, 234 U. S. 342, 351; *Illinois Central R. R. Co. v. State Public Utilities Comm.*, 245 U. S. 493, 506; *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563. The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable." (p. 485)

In *Railroad Commission of California v. Southern Pacific Company, et al*, 264 U. S. 331, the Court had before it the validity and effect of paragraphs (18) to (21) of Section 402 of the Transportation Act, 1920, which have become the same paragraphs of Section 1 of the amended Interstate Commerce Act. In that case the Railroad Commission of California had entered certain orders undertaking to require the establishment of a new union passenger station at Los Angeles by several interstate carriers, involving the abandonment of their separate stations, extensive changes in relocations of their main tracks, and very great expense. The Court held that this could not be brought about either by voluntary action of the carriers or by order of a state commission in the absence of a certificate of the Interstate Commerce Commission under the Statute just mentioned. The Court, after quoting with approval from the *Dayton-Goose Creek Case*, said:

"It is obvious . . . that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. . . . . This is a drastic limitation of a carriers' control and use of its own property in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. . . . ." (pp. 343-344)

Texas & Pacific Railway Company v. Gulf, Colorado and Santa Fe Railway Company, 270 U. S. 266, also involved the paragraphs of the Transportation Act above referred to. In this case the Court said:

"By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *Chicago Junction Case*, 264 U. S. 258; *Railroad Commission v. Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses. . . . . (pp. 277-278)

"For invasion through new construction of territory

adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal commission issues its certificate that public necessity and convenience require its construction." (pp. 278-289)

In the Courts below the Northside Belt referred to and relied on the decision of this Court in *State of Texas v. Eastern Texas Railroad Company,* 258 U. S. 204, as supporting the view that the provisions of the Transportation Act and amended Interstate Commerce Act here relied on have no application to carriers lying wholly within a State, and also that a common carrier whose facilities lie wholly within a State may lawfully devote itself to the transportation solely of state commerce to the exclusion of interstate commerce. The effect of this decision, in so far as material in this connection, is simply that the Statute is not to be construed as clothing the Interstate Commerce Commission with authority over the discontinuance of the purely intrastate business of a railroad whose situation and ownership are such that interstate and foreign commerce will not be affected by that business (p. 218).

This Court, nevertheless, held in *Railroad Commission of Texas v. Eastern Texas Railroad Company,* et al, 264 U. S. 79, that such railroad, having been authorized by the Interstate Commerce Commission pursuant to the

Statute to cease operation with respect to interstate business, and its purely state business being insufficient to justify continued operation, might lawfully abandon and take up its line.

Colorado v. United States, 271 U. S. 153, involved the abandonment under authority of the Interstate Commerce Commission granted pursuant to the terms of the Act of a branch line of railroad lying wholly within the State of the owning company's incorporation, when continued operation would result in large deficits, constituting undue burden on interstate commerce. In that case this Court sustained absolutely the validity of the Act and the power of the Commission under it, saying:

"The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry. v. Tennessee,* 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad*

Commission v .Southern Pacific Co., 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

"This railroad, like most others, was chartered to engage in both intrastate and interstate Commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co. v. United States*, 222 U. S. 20; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of 'spur, industrial, team, switching or side tracks located . . . wholly within one State.' See *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., supra.* But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

"Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive juris-

diction conferred upon the Commission by Section 20a over the issuance of securities. Compare *Venner v. Michigan Central R. R. Co., ante,* p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry. v. United States,* 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission v. Goodrich Transit Co.,* 224 U. S. 194. And upon it rests likewise the power exerted by this Court in setting aside the state regulations involved in *Union Pacific R. R. Co. v. Public Service Commission,* 248 U. S. 67, and *St. Louis & San Francisco Ry. Co. v. Public Service Commission,* 254 U. S. 535. See also *United States v. Ferger,* 250 U. S. 199; *Stafford v. Wallace,* 258 U. S. 495; *Chicago Board of Trade v. Olsen,* 262 U. S. 1.

"The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission v. Eastern Texas R. R. Co.,* 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York v. United States,* 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate serv-

ice must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." (pp. 163-166).

It is submitted that every word in the foregoing extract from the opinion of this Court,—changing only "abandonment" to "construction", applies to the present case, and speaks louder than a trumpet against the decisions of the courts below.

The contention that a common carrier by railroad, created and obligated by the very law of its existence to transport interstate commerce, designed and intended by its creators to transport interstate commerce and which must inevitably transport interstate commerce, is not engaged in interstate commerce or subject to the Act until it shall actually have transported such commerce is completely destroyed by the provisions of Paragraphs (1) and (7) of Section 6 of the Interstate Commerce Act as Amended.

Paragraph (1) provides: "That every common carrier subject to the provisions of this act, shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other common carrier by railroad, by pipe line or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route

shall file, print and keep open to public inspection as aforesaid the separately established rates, fares and charges applied to the through transportation. . . . ."

Paragraph (7) provides: "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge, or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time. . . . . ."

If the view of the defendant and of the courts below that no carrier whose line is situated wholly within a state becomes or can become subject to the act until it shall actually have transported some article in interstate commerce is correct, then the foregoing provisions are meaningless.

V.

The Northside Belt is incorporated under the laws of the State of Texas as a common carrier. Article X, Section 2, of the Constitution of Texas provides:

"Railroads heretofore constructed, or which may hereafter be constructed, in this State are hereby declared public highways, and railroad companies common carriers."

A terminal railway company, such as the Northside Belt, being a common carrier, is charged by law with the duty of discharging to the public and to other railroad companies all the duties of a comman carrier (*Houston Belt & Terminal Railway Company v. Hamburger*, 143 Southwestern Reporter, 272)."

All railroad companies created under the laws of Texas, are, as are common carriers generally under the common law, charged by the law of their creation with the duty of receiving and transporting all freight tendered them, without regard to its interstate or state character.

Article 6407, Revised Statutes of Texas, 1925 (Act of 1887, page 110, Gammel's Compiled Laws of Texas, Volume 9, page 908), provides:

"All railway companies doing business in this State shall be and they are hereby required to receive from all railway companies with which they may connect at the State line of this State, or at any place within this State, or at any or all places where they may cross the line of any other railway doing business, or operating a line of railway in this State, all freights and passengers coming to it from such connecting line, and destined to points on its line, or to points beyond its line or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received, and upon the same terms and conditions with those made by such line for like or similar service against any other railway in or out of this State with which it does business. . . . ."

This enactment is in truth merely declaratory of the common law. It is not, as has been contended by some, void in so far as it relates to interstate commerce. It creates no burden on interstate commerce. Reasonably construed, it requires merely that railroad corporations of the State shall take whatever steps may be necessary under the Federal law to enable them to comply with

the requirements of the State statute, and with their common law duty.

May a State by act of its legislature provide that railroad companies incorporated under the laws of the State shall not connect at the State boundaries or elsewhere with railroads incorporated under the laws of the United States or of other States or engaged in interstate commerce? Beyond question, no. May a State provide that railroad companies incorporated under its laws shall not receive or transport interstate commerce? Unquestionably, no. It, therefore, follows that since a State may not lawfully forbid a railroad company of its creation to engage in the transportation of interstate commerce, it may require it to do so, subject always to such regulation as may be imposed by Congress. The State of Texas has imposed this duty on its creatures.

The Northside Belt was created to engage in interstate commerce as well as in state commerce. It could not under the law of Texas nor, it is believed, under the laws of the United States have been created for the sole purpose of engaging in the transportation of state business. It is disclosed by the record without conflict that it was designed by its creators to engage in interstate as well as state commerce and that it inevitably must engage in interstate commerce as soon as it shall engage in any commerce at all. It is, therefore, engaged in interstate commerce, and subject to Federal regulation from the moment of its creation and, in truth and in fact, is, and was from the moment of its creation, a common carrier, subject to the Interstate Commerce Act.

VI.

The purpose of the Interstate Commerce Act as amended, affirmatively to build up a system of railways

prepared to handle promptly the interstate traffic of the country and to enable the owners of the railways to earn enough to maintain their properties in such a state of efficiency that they can well carry the burden is, under the terms of the Act, to be accomplished in part by preventing the construction and operation of new railways and extensions of existing railways not required by the convenience and necessity of the public. The Congress recognized that more railroads will not create more traffic, but on the contrary, will bring about the division of existing traffic among more claimants of a share of it.

The purpose of paragraphs (18) to (22) of section 1 of the Act is clearly to prevent the unnecessary multiplication of mouths to be fed from the whole traffic of the country, state and interstate, inextricably commingled. If it were possible, and we submit that it is not, that common carriers could be created by states for the sole purpose of engaging in state commerce, to the exclusion of interstate commerce, the construction and operation of such lines would adversely affect the existing carriers engaged in transporting interstate commerce and the whole commerce of the country, just as surely and almost as much as though the new carriers were authorized to engage and did engage in the transportation of interstate and state commerce alike.

Is it conceivable that the Congress, intending to build up a system of railways adequate to handle promptly and efficiently the interstate traffic of the country and to earn enough to maintain themselves in a state of proper efficiency, has permitted it to be possible that, under state authority alone, every existing interstate railroad in every state may be paralleled, its state business taken away from it, and it so crippled as to be incapable of discharging the great duties imposed upon it? Is it possible that this Court will so construe the

Act of Congress as to ignore its plain purpose, and to render nugatory its effort to create and support an efficient transportation system? To do so will be to pursue the shadow and to ignore the substance.

VII.

The Interstate Commerce Commission has continuously asserted its jurisdiction under the Interstate Commerce Act to give or withhold its permission for the construction of new lines wholly within the boundaries of a state, and that jurisdiction has not hitherto been challenged.

Application of Michigan Northern R. R., 65 I. C. C. 480.

Application of Coon Bayou & Arkansas City Ry. 65 I. C. C., 701.

Application of Uvalde & Northern Ry. Co., 67 I. C. C. 204; 67 I. C. C. 554.

Application of Golden Belt R. R. of Kansas, 67 I. C. C. 370.

Application of Golden Belt Ry. (Application denied) 71 I. C. C., 233.

Application of National Line R. R. Co. (Application denied) 71 I. C. C. 556.

Application of Shreveport & Northeastern R. R. (Application denied) 71 I. C. C. 586.

Construction of line by Jefferson & Southwestern Ry. (Application denied) 76 I. C. C. 778.

Application of Longview, Portland & Northern, 79 I. C. C. 805.

Construction of line by Mississippi Ry., 82 I. C. C. 698.

Administrative practices by government departments, long adhered to, are given weight by the courts in determining the proper interpretation to be placed upon a statute.

In Kern River Company vs. U. S., 257 U. S., 147, Mr. Justice Van Devanter, speaking for the Court, said:

"Even if the meaning of a Federal Statute were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it." Citing Logan vs. Davis 233 U. S. 613, in which the Court referred to: 'The settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years will not be disturbed except for very cogent reasons.'

VIII.

It is submitted that the United States Circuit Court of Appeals erred in holding that all issues presented in the bill of complaint had become moot. The Court said:

"It is disclosed by the record that no restraining order or interlocutory injunction was issued and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which had been done since the suit was brought, the suit has become a moot one, it being altogether futile to forbid the doing of things which already have been done."

The undisputed facts, as disclosed by the record, are: On or about the 8th day of June, 1925, the Northside Belt duly filed proceedings for the purpose of condemning a right of way across the land of petitioner; that such proceedings were duly prosecuted, resulting in an award to complainant of $750.; that following the condemnation proceedings, respondent deposited with the County Clerk of Harris County, Texas, the sum of

$1,500., double the amount of the award, and became entitled, under the State statute, to take possession of the land in question on the 13th day of June, 1925.

Immediately following the award of the commissioners, petitioner gave notice of appeal, under and by virtue of the statute of the State of Texas, to the County Court at Law of Harris County, Texas, where said condemnation proceedings are now pending, awaiting the final result of this suit. That about the time of the hearing before the Commissioners, petitioner filed and presented to the United States District Judge a bill for injunction, praying that respondent be temporarily and, on hearing, perpetually restrained from prosecuting its condemnation suit, as well as from constructing, maintaining, and operating its railroad over and across the land of petitioner; that the United States District Judge refused to grant a temporary injunction, but set the case down for hearing, requiring the Northside Belt to appear within five days and show cause why said injunction should not be granted.

The Northside Belt immediately after being advised of the fact that said temporary injunction had been denied by the court, procured an extra force and built its track over and across petitioner's land, completing same at about 11:00 p. m. on June 13th, 1925.

The condemnation proceeding in the County Court at Law, where it will be tried *de novo*, was pending at the time the case was tried in the United States District Court, and at the time when the opinion was rendered by the United States Circuit Court of Appeals for the Fifth Circuit. It is still pending, and if the relief prayed for herein is granted, must fall, with the powers which the Northside Belt is wrongfully exercising under it. (R. 21-22).

The work of constructing the track, so hurriedly done, may and should be undone.

In 32 Corpus Juris, page 24, Sec. 6, the rule is laid down as follows:

"Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things, and thereby prevent the gaining of an advantage by reason of the wrongful act, provided plaintiff has been guilty of no wrongful acquiescence or delay. Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case."

In *St. Louis & S. F. R. R. Co. v. Cross*, 171 Federal, 480, it was held:

"It is also insisted in support of the demurrer that the defendant Meyer actually made the declaration against the complainant, revoking its authority in the state. In the amended bill it is alleged that the signing of the instrument was 'subsequent to the institution of the suit.' It bears date one day later than that of the filing of the original bill and of the preliminary order restraining its issuance, but on the day of service of the order. Presumably it was executed before the order became effective or was served. It does not appear that 'a foreign domicile' was alleged in the petition for removal or was the ground of the declaration; but assuming that such domicile was alleged, and the fact certified to the Secretary as contemplated in the legislative act, still must the relief prayed for be denied because the declaration shortly preceded the time when the order became effective or was served? The point is highly technical and goes to an avoidance of a decision on the merits. It is not available. This court had acquired jurisdiction over the subject-matter of the suit before the defendant acted, and he

could not therefore prejudice or defeat the rights of the complainant. In such a case a court of equity has ample 'power to compel by mandatory injunction the restoration of the former conditions of things,' and prevent the gaining of advantage by reason of the wrongful act. 22 Cyc. 743; *Ex parte Lennon,* 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; High on Injunctions (4th Ed.) Sec. 5a; Bishpam's Prin. Eq. 400; Gibson's Suits in Chancery, Sec. 824. The demurrer will be overruled."

The railroad having been wrongfully and illegally constructed on petitioner's property, its maintenance may be enjoined, and in any event, operation being a continuing act, may be enjoined at any time, even though begun prior to the trial. In fact operation has not yet been begun. *Turney vs. Shriver,* 269 Ill. 164; 109 N. E. 708; *Los Angeles Water Co. vs. Los Angeles,* 88 Fed. 720; *Surrall v. Am. Tel. Co.,* 224 Ill. 266.

That the case is not moot, is shown by the following authorities:

"A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights." *Adams v. Railroad Company,* 21 Rhode Island 134.

"A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. *Ex parte Steele,* 162 Fed. 694, 702."

"The fact that a suit may be a friendly one would not of necessity render it a 'moot case,' which is defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights. *State*

v. First Catholic Church of Lincoln, 128 N. W. 657, 658, 88 Neb. 2."

"A 'moot case' is one which seeks to determine an abstract question which does not rest upon existing facts or rights. 'It is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy.' *State v. Dolley,* 108 Pac. 846, 82 Kan. 533 (citing *Adams v. Union Railroad Co.,* 42 Atl. 517, 21 R. I. 140, 44 L. R. A. 273; *Ex parte Steele,* 162 Fed. 694, 701.)".

IX.

The Congress in accomplishing its sole objective in the enactment of the statute, the regulation of interstate commerce by fostering and preserving the national system of interstate railroad transportation, has made the Northside Belt subject to the Act:

First, by virtue of the exclusive control by the Congress over interstate commerce and its instrumentalities, because the railway, conceived for the purpose of transporting interstate as well as state commerce, chartered and bound by the law of its creation to transport interstate as well as state commerce, and inevitably destined to transport interstate commerce, is engaged in interstate commerce from the moment of its creation;—

Second, by virtue of the incidental control by the Congress over state operations when they invade the field of the national transportation system, because the railway, proposing to sieze a part of the business and revenue on which the national system depends for support and for the efficient discharge of its great duties, has thrust itself into

the field where the powers of the nation have, and must have, full sway.

The simple expedient of a new charter, and a new railroad, ready and able, in the twinkling of an eye, to sieze upon a part of the revenue of the national transportation system (it matters not whether from state or interstate transportation) cannot avail to thwart the purpose of the supreme authority.

It is respectfully submitted that the decree appealed from should be reversed.

H. M. GARWOOD,
J. H. TALLICHET,
Solicitors for Petitioner,
Texas and New Orleans
Railroad Company.

(32654)

IN THE

Supreme Court of the United States

October Term, 1927, No. 231

TEXAS AND NEW ORLEANS RAILROAD COMPANY, Petitioner,

vs.

NORTHSIDE BELT RAILWAY COMPANY, Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reply Brief For TEXAS AND NEW ORLEANS RAILROAD COMPANY

H. M. GARWOOD,
J. H. TALLICHET,
Solicitors for Petitioner.

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Reply Brief For TEXAS AND NEW ORLEANS RAILROAD COMPANY.

Respondent, Northside Belt Railway Company, appears to base its entire case on the proposition that an incorporated railway company, a common carrier, exercising the power of eminent domain, having constructed its railroad, may operate it or not at its pleasure; and may, at its pleasure, transport only intra-state commerce.

In reply, petitioner, Texas and New Orleans Railroad

Company submits four statutes of the State of Texas, two of the provisions of the Interstate Commerce Act, as amended, and brief quotations from a decision of this Court:

I.

Revised Statutes of Texas, 1925:

> Article 6418: If any railroad corporation organized under this title shall not within two years after its articles of association shall be filed and recorded as provided in this title, begin the construction of its road, and construct, equip and put in good running order at least ten miles of its proposed road, and, if any such railroad corporation, after the first two years, shall fail to construct, equip and put into good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall, in either of such cases, forfeit its corporate existence, and its powers shall cease as far as relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation. *The provisions of this article shall not apply to or in any manner affect railway companies incorporated for the construction and operation of urban, suburban and belt railroads for a distance of less than ten miles, as provided in Chapter 1 of this title; provided, that all such companies shall, within twelve months from the date of their charter, complete a portion of their road and commence and continue the running of the cars thereon.* This article shall apply as well to branch lines as to main lines of railroads.

(Note: We have *italicized* the provisions of the above law which are applicable to Respondent.)

Article 6357: Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings and stopping places established for or receiving and discharging way passengers and freight and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of railroad companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and such abuse shall at once be corrected and regulated by the Railroad Commission. No railroad corporation nor any manager or receiver of any railroad shall ever abandon operation of its trains over said railroad or any part thereof, and if any railroad corporation, manager or receiver has or may hereafter abandon operation of its trains over its said railroad, or part thereof, the Railroad Commission of Texas shall at once issue its order directing said railroad corporation, manager or receiver to at once resume operation of its trains over said road or part thereof, in accordance with the orders, rules and regulations of the said Commission.

Article 6360: In case of the refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same, or either of them, at the regularly appointed time, such corporation shall pay to the party aggrieved

all damages which shall be sustained thereby, with costs of suit; and in case of the transportation of property shall in addition pay to such party special damages at the rate of five per cent per month upon the value of the same at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for its transportation. In suits against such corporation under this law, the burden of proof shall be on such corporation to show that the delay was not negligent.

Article 6410: Each railway company doing business in this state shall be required to receive from all steamships, steamboats and other water craft and vessels, at their usual places for receiving such freights at the several ports on the coast of Texas, and on the inland waterways in this state, all freights and passengers coming to it from such steamships, steamboats, and other water craft and vessels, and destined to points on its line or to points beyond its line, or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against such steamship line, steamboat owner or company, or the owner of any other water craft or other vessels from whom such freight or passengers are received, and upon the same terms and conditions with those made by such railway company for like or similar service with any other person, steamboat company, steamship company or owners, or any other water craft or vessel, with which it does business at such points or stations as aforesaid.

II.

Interstate Commerce Act, as amended:

Section 1. . . . .

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or un-

necessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

III.

Central Transportation Company vs. Pullman's Palace Car Company, 139 U. S., 24:

"The charter of a corporation read in the light of any general laws which are applicable, is the measure of its powers. . . ." (p. 48)

"The plaintiff was not a strictly private, but a *quasi*-public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of its duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise." (p. 51). . . .

"The necessary conclusion from these premises is that the contract was unlawful and void, because" . . . (*ultra vires*) . . . "and because it involved an abandonment by the plaintiff of its duty to the public." (p. 53)

H. M. GARWOOD,
J. H. TALLICHET,
Solicitors for Petitioner,
Texas and New Orleans
Railroad Company.

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IN THE

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Petitioner,

vs.

NORTHSIDE BELT RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT.

The question in this case simply is:

Whether the railroad track of the Respondent, duly chartered under the laws of the State of Texas as a terminal railway company, not a part of or in any way connected with another railroad or railway system and not engaged in any kind of commerce, either interstate or intrastate—the track to be in extent approximately five miles—may be con-

structed without the previous authorization of the Interstate Commerce Commission.

STATEMENT OF THE CASE.

The statement of the case as given in the brief for the Petitioner is in the main accurate, though some of the conclusions there stated we do not think are entirely so.

We give this as in our opinion a somewhat clearer statement.

The case grows out of a condemnation in full accordance with the laws of Texas for use as a part of Respondent's right of way, of a tract of land belonging to Petitioner in Harris County, Texas, in width, 100 feet, and in length, 1127 feet, comprising about 2½ acres.

As was its right under the statutes of Texas (Article 6336, Revised Civil Statutes of Texas of 1925), Respondent, when the suit was filed, had duly instituted the proper proceeding for the condemnation of the tract; the tract had been duly condemned and awarded to Respondent; the award by the Commissioners in the proceeding of Petitioner's damages, in the amount of $750.00, had been duly made; and this amount together with an additional amount re-

quired by law had been by Petitioner duly paid into court, and it had also duly filed the bond required by law, duly approved, all in full compliance with the laws of Texas in relation to such a proceeding.

This, under the statutes of Texas (Article 3268), entitled Respondent to immediate possession of the tract so condemned. It took such possession, and, there being no legal obstacle in the way, laid its track across aforesaid land of Petitioner on the night of the same day Petitioner filed the suit.

In a word, the taking by Respondent of possession of the strip of land and the laying of its track along it, was and is lawful under the statutes of Texas and in keeping with the right given it by those statutes.

On the filing of the suit, the Court having refused to issue a restraining order or injunction on the Petitioner's prayer, the Respondent filed its answer, directing attention to the fact that in its opinion the case was moot; setting up in full the condemnation proceedings as above recited; and further pleading that under its charter from the State it had the right to so construct its track and condemn property for its use as a right of way in that connec-

tion in accordance with the laws of the State; that it was not in any way engaged in interstate commerce or other commerce; that the only connection it contemplated with any other railroad was with the Municipal and Harbor Belt Railroad, a railroad owned by and chiefly within the City of Houston, Texas, and which was not engaged in interstate commerce or under the supervision or regulation of Interstate Commerce Commission or by law subject to its supervision or regulation; and that, by reason of the premises, neither it nor its line of railroad and operations were governed or controlled by the Interstate Commerce Act as amended, or by the Transportation Act of 1920, nor were they subject to the jurisdiction of the Interstate Commerce Commission; and further saying, in substance, that if such Acts were to be held as inhibiting its right to build its railroad track, to that extent they exceeded any powers granted to the Congress under the Constitution of the United States and to such extent were void. Record, 7-10.

The statement in Petitioner's brief as to the result in the District Court, on the appeal, etc., is correct.

THE FACTS.

As a part of the statement of the case, we be-

lieve the following summary of the facts will be helpful.

The railroad track of Respondent is in the vicinity of the City of Houston. It is or will be approximately five miles long, and situated along the Ship Channel, the deep water course extending from the City of Houston to the Gulf. Along the Ship Channel are various industries, among them those of the Galena Signal Oil Company and the American Petroleum Company, concerns in which Mr. Cullinan, President of the Respondent, is interested. The Petitioner operates its railroad in the same vicinity, and, as is manifested by this suit, is opposed to the building of any other railroad there.

The plants of the Galena Signal Oil Company and the American Petroleum Company are about two miles apart. The Galena has several miles of privately owned industrial railroad tracks on its premises. The American Company also has several miles of such tracks on its premises. There is a rail connection between the industrial tracks of these two companies. It is owned by Mr. Cullinan and is on land belonging to the Federal Investment Company in which he is interested. This rail connection between the industrial tracks of these two companies is about a

mile long. It does not belong to Respondent, nor does Respondent operate it. Record, 27.

Both the Galena Company and the American Company ship and export oil, receiving oil from and shipping oil to points beyond Texas. Record, 22. The railroad of Petitioner serves the Galena Company, having a terminus at that Company's plant. Record, 23. Oil consigned to the American Company at Galena, the terminus of Petitioner's railroad at the Galena plant, is carried by Petitioner's railroad to Galena, and from there by the switch engine of the Galena Company is moved over the rail connection above mentioned extending between the plants of the two companies. Record, 24. Mr. Cullinan testified that it was his intention to make this rail connection between the plants of the two companies a part of Respondent's railroad when built, but there was no understanding except his own that this would be done.

The railroad track of Respondent is to extend, or as already built extends, from a corner of the premises of the American Petroleum Company, westerly, a distance of approximately five miles, to an intersection with the track of the Municipal & Harbor Belt Railroad.

The Municipal & Harbor Belt Railroad was built

and is owned by the City of Houston. It handles both interstate and intrastate freight. It connects with the main lines of the different railroads entering Houston and is operated by a joint association composed of those railroads under a contract made a part of the record. Record, 21. The association so operating that railroad does not make any reports to the Interstate Commerce Commission, and files no tariffs either with that Commission or the Railroad Commission of Texas. Record, 31.

We quote as follows from the opinion of the Judge of the District Court (Record, 11-12):

> "Mr. Cullinan testified that when the road was completed it was intended to be operated. That he is interested in the Galena Signal Oil Company and the American Petroleum Company. That those companies are both engaged in the shipping and exporting of oil from points outside the state of Texas, and that they have private industrial tracks of their own. That the complainant serves the Galena Signal Oil Company and through it the American Petroleum Company. That this Northside Belt Railroad was being built to give facilities which were needed there and which ought to have been earlier built, and which the witness and those associated with him were undertaking to do because others had failed to do. That it was intended to make the industrial tracks owned by the

> American Petroleum Company a part of the Northside Belt Railway and when the work was completed to have a complete connection through the Northside Belt Railway with the Municipal Belt for those plants. That when the Northside Belt Railway was finished they expected it to be operated as a terminal railroad, with all the rights and powers which its charter gave it. That the T. & N. O. is the only railroad that operates a line down to the western terminus of the Galena Signal and when the Northside Belt was finished it would give these properties a connection with the Municipal Harbor Railroad." Record, 11-12.

No industries other than those of the Galena Signal Oil Company and the American Petroleum Company are now located on Respondent's proposed railroad. Record, 25.

The Judge of the District Court expressly found **"that the construction of this railroad neither directly nor indirectly burdens or interferes with, affects or is affected by interstate commerce in its present state, and that the Act invoked therefore has no application."** Conclusion of Opinion, Record, 13.

The injunction prayed for by Respondent was accordingly denied "without prejudice to the right of complainant to again apply when and as the activi-

ties of the defendant bring it within the purview of the Act." Record, 13.

Mr. Cullinan testified (and his testimony is without contradiction):

> **"The Northside Belt Railway Company is not now engaged in any character of commerce whatever."** Record, 27.
>
> **"The Northside Belt Railway Company is not now operating any railroad whatever." Record,** 27.

He said that "he naturally assumed that the operation of the railroad would develop into carrying cars holding interstate business." Record, 25. But in such connection he testified:

> **"The Northside Belt Railway Company is not now engaged in any character of commerce whatever. I have no kind of commitment or agreement of any character or kind with any railroad company, corporation, individual, or anyone else on earth, with respect to the receiving or transporting of interstate freight or passengers, though I hope, of course, to make such arrangements at a later time. That is all a matter for the future. That may or may not come about. I have no means of knowing now, except expectation or hope, that we will ever carry any interstate freight on that road, or not."**

It was agreed on the trial that the condemnation proceedings instituted by Respondent, above recited, were filed and completed as stated in accordance with law; that the Petitioner through its counsel participated in them, and that it entered its appeal from the final order making the award in those proceedings; and that the Respondent, after complying with the law in respect to making payment into court of the lawful amount and filing its bond, took possession of the land so condemned and on the 13th of June, 1925 (the date of the filing of Petitioner's bill of complaint), laid its track across the land and at the time of the trial was in possession thereof. Record, 21.

Also that Respondent was duly chartered under the laws of Texas as a terminal railway company; and that it had not obtained any authorization from the Interstate Commerce Commission for the construction of its railroad track. Record, 20.

WHETHER THE CASE IS NOT MOOT.

We have no disposition to raise a technical question and under it evade a decision on the merits of the case. But we believe the case is probably moot, and deem it our duty to bring this feature to the attention of the Court.

The Circuit Court of Appeals held it to be moot, and for that reason declined to consider the case on its merits. This was because the suit of Petitioner was essentially one to enjoin the prosecution by Respondent of the condemnation proceeding and the construction of Respondent's track across Petitioner's land. The condemnation proceeding had been completed when the suit was filed. True, Petitioner gave notice of its appeal from the award of the Commissioners in the proceeding. But when the suit was filed the proceeding was complete, and Respondent by complying with the law of the State in respect to paying the amount of the award into court, with an additional amount, and the filing of bond, duly approved, had done everything required by law as a condition of entitling it to take immediate possession of the land condemned, and under the law of the State had the right to so take such immediate possession.

This right was utterly unaffected by Petitioner's giving notice of appeal and on such appeal being entitled to a trial in the County Court.

The Texas statute on the subject, under the title

of "Eminent Domain," is Article 3268 of the Revised Civil Statutes of 1925, which reads:

> **"Damages paid first.**—If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:
>
> 1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.
>
> 2. In addition thereto, it shall deposit in said court a further sum of money equal to the amount of the damages awarded by the commissioners, and which shall be held, together with the award itself, should it be deposited in court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the judge of the court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the court below or upon appeal."

In its brief, the Petitioner speaks a number of times of its being entitled to a de novo trial of the

condemnation proceeding in the County Court, and of the track of Respondent having been laid across its land while this right subsisted. But this Article of the Texas statutes, in its third section, discloses plainly that Petitioner could not be entitled to an injunction against the prosecution of the condemnation proceeding or Respondent's taking possession of the land condemned and putting its track upon it, since in the third section of the Article it is declared and provided that if on final decision of the case it is determined that the right to condemn the land does not exist, **the plaintiff in the condemnation shall surrender possession of it, if possession has been taken pending litigation; and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages if any have been suffered by the defendant because of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited,**—there being thus afforded under the statute a complete legal remedy and an ample one.

We quote the third section of the Article as follows:

> "3. Should it be determined on final decision of the case that the right to condemn the prop-

> erty in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff."
>
> If the cause should be appealed from the decision of the county court, the appeal shall be governed by the law governing appeals in other cases; except the judgment of the county court shall not be suspended thereby."

Not only was the condemnation proceeding complete when the suit was filed, but Respondent, as it had full right to do under the State law, took possession of the condemned land on that date and built a track across the land. Its building of the track may have been hurried, but it was perfectly lawful under the State law and in the exercise of a plain right thereby given. Accordingly, possession of the land had been lawfully taken and construction of the track

had been lawfully made under the State law, with no violence done any order of the Federal Court, when the case came on for trial in that Court.

It is the **construction** of this railroad track which Petitioner in this case maintains must have been authorized by the Interstate Commerce Commission.

Its suit, in its very essence, is an **injunction** suit, and to restrain that **construction** across its property under the condemnation award.

That construction was an accomplished fact when the case was tried on its merits in the District Court.

This is what caused the Circuit Court of Appeals in its opinion to say:

> "This was a suit by the appellant, **which sought only a temporary restraining order and an injunction** restraining the appellee from prosecuting a suit instituted by it for the condemnation of described land of the appellant, and from constructing, maintaining, or operating a described railroad upon or across that land. The appeal is from a decree dismissing the bill without prejudice to the right of the appellant to apply in the future for an injunction against the appellee, 'if its activities in the future shall bring it properly within the purview of the act of Congress known as the Transportation Act of 1920'

It is disclosed by the record that no restraining order or interlocutory injunction was issued, and that, before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same. As the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought, the suit has become a moot one; it being altogether futile to forbid the doing of things which already have been done. In the situation disclosed the dismissal of the bill without prejudice was proper. Smyth vs. Asphalt Belt Ry. Co. (C. C. A.) 12 F. (2d) 14.

The decree is affirmed." Record, 49-50; 16 Fed. (2nd) 782.

The characterization of the suit in the opinion of the Circuit Court of Appeals as one only for a **temporary restraining order** and a **temporary injunction,** is entirely accurate. The bill of complaint reveals, plainly, that the only purpose of the suit was to obtain a temporary injunction against the prosecution of Respondent's condemnation proceeding and the construction of the railroad track under that proceeding across Petitioner's land. The bill alleges in next to its concluding paragraph that Respondent was "actively preparing to press the said con-

demnation suit to trial and to construct, maintain and operate the said terminal railroad upon and across the complainant's property." The prayer was that the injunction restrain the Respondent from "maintaining or operating" the railroad upon or across Petitioner's property, as well as from so constructing it. But the record is barren of any proof that there was any purpose on Respondent's part to then begin any operation of the railroad, or at any time in the near future.

The **operation** of the railroad is not involved in this case.

We have at all times conceded that prior to any operation of the railroad in interstate commerce, the authorization therefor by the Interstate Commerce Commission would be necessary.

The naked right **to build** the railroad—**to construct the track** across Petitioner's land as a power given by the State's charter, is alone the question here involved.

As showing that by the suit only a temporary injunction was sought, and a temporary restraining order until the hearing on the issuance of a temporary injunction could be had, we quote the

prayer of the bill of complaint in full, as follows:

> "Premises considered, complainant prays that upon hearing hereof this Honorable Court issue its most gracious writ of injunction, enjoining and restraining the respondent herein, its attorneys, officers, agents, servants and employees, from prosecuting the said condemnation suit and from constructing, maintaining or operating the terminal railroad aforesaid upon or across the property of the complainant herein.
>
> And complainant further shows to the Court that the said respondent is now actively preparing to press the said condemnation suit to trial and to construct, maintain and operate the said terminal railroad upon and across the complainant's property and, unless immediately restrained and prevented therefrom by a restraining order issued by this Honorable Court, will accomplish it (its)—said purpose before this cause or complainant's application for an injunction can be set down and heard."
>
> Wherefore, complainant prays the Court that it forthwith enter its temporary restraining order restraining the said respondent until further hearing hereof from doing any of the things herein sought to be enjoined." Record, 5-6.

With the condemnation proceeding complete, and with the track of the railroad already laid across Petitioner's land when the case was tried, what

was there, we ask, for a temporary injunction to operate against?

If Petitioner should finally be held entitled to prevail in the case, and its pleadings were such to warrant a court by appropriate decree to restore it to the condition it was in before the condemnation proceeding and construction of the railroad track across its land, that relief would be granted by the court's merely compelling Respondent to remove the track and by decreeing to Petitioner possession of the land. Such a remedy is in fact an ordinary decree for an abatement and for possession. It is in no proper sense an injunction of any kind. Pomeroy's Equity Jurisprudence, Volume 4, Section 1359, 4th Edition.

But the Petitioner's suit is one for an injunction—a temporary injunction, pure and simple. That is the case made by its pleading. It will not be amplified by the Court.

Because it is only such a suit and because plainly the things sought to be enjoined have already been done, and had been done when the trial was had in the District Court, and may not be undone through the office of an injunction, it is apparent, we think, as was held by the Circuit Court of Appeals, that the case is moot.

High on Injunctions, a standard text, Volume 1, Section 23, 4th Edition, declares:

> "The appropriate function of the writ of injunction is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived. It is not, therefore, an appropriate remedy to procure relief for past injuries, and it is only to be used for the prevention of a future injury actually threatened, and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages. And if the act sought to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act."

That the function of an injunction is to afford preventive relief, not to redress alleged wrongs already committed, and that it will not be used to take property out of the possession of one party and put it into that of another—as would be done here were an injunction held as properly issuable—was held by this Court in Lacassagne vs. Chapuis, 144 U. S., at page 124, in the following language:

> "The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means

> of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High on Injunctions, 2nd Ed. 355."

In numerous cases this Court has held that there was no controversy left in which effectual relief could be afforded under the pleading—rendering the action moot, such as a suit to enjoin revocation of an annual license, since expired, Security Mutual Insurance Company vs. Prewitt, 200 U. S., 446; a contest for an expired term of office, Tennessee vs. Condon, 189 U. S., 64; a suit to restrain Federal control of cables, now surrendered, Commercial Cable Company vs. Burleson, 250 U. S., 360, and others with like conditions.

Passing this feature, we submit as counter propositions, the following:

I.

The Interstate Commerce Act as amended and the Transportation Act of 1920 have no application to the building of such a railroad as this one, since

it is evident that its construction cannot in anywise affect interstate commerce.

II.

The State of Texas, as a sovereignty, being competent to grant unto Respondent its charter, Respondent, under that authority alone, may provide itself with the facilities whereby the powers conferred by the State may be rendered effective, and hence under that authority, may acquire its roadbed and build its track. It is entitled to a track for its intrastate business, regardless of whether in the future it operates or does not operate in interstate commerce.

ARGUMENT.

We have here a railway company that (a) is absolutely independent in ownership and character; (b) is not connected in any way with any other railroad company, and is not a part of any railroad system; (c) is not operating any railroad whatever; (d) is not engaged in any character of commerce whatever; and (e) is distinctly not engaged, in any degree, in interstate or foreign commerce.

The case presented is not one or analogous to one where State authorities are seeking to compel the erection of a union station so expensive as to unduly

deplete the financial resources of interstate carriers (Railroad Commission vs. Southern Pacific Company, 264 U. S. 331); nor is it a case where one interstate railroad seeks to construct a branch line extension which will impair its own financial resources or those of another interstate carrier (Texas & Pacific Railway Company vs. Gulf, Colorado & Santa Fe Railway Company, 270 U. S., 266).

Neither is it a case where a branch line of an interstate railway system is being operated at a loss, resulting in the depletion of the financial resources of the system, (Colorado vs. United States, 271 U. S., 153).

To none of these, is this case akin.

It more clearly presents the situation dealt with in Texas vs. Eastern Texas Railroad Company, 258 U. S., 204, than is found in any of the decisions of this Court.

As compared with that situation, it presents, however, this important distinction:

There, the railroad was in full operation. Not only so, but it had all the character of a carrier "engaged in" interstate commerce. Approximately two-thirds of its traffic was of that nature.

Here, there has been no operation at all of the railroad. It is not "engaged in" any kind of commerce, and particularly it is not "engaged in" interstate commerce. And it has none of the character or status of an interstate carrier.

In that case, Your Honors said:

> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate or foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

> "If paragraphs 18, 19 and 20 be construed as **authorizing** the Commission **to deal with the abandonment of such a road as to intrastate** as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable."

And at another place in the opinion, this:

"Like the act of which they are amendatory, these paragraphs are **expressly restricted to carriers engaged in transporting persons or property in interstate and foreign commerce.**"

And this:

"Although found in the Transportation Act, these paragraphs are amendments of the Interstate Commerce Act and are so styled. They contain **some broad language,** but do not plainly or certainly show that they are intended to provide for the complete abandonment of a road like the one we have described. Only by putting a liberal interpretation on general terms can they be said to go so far. Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce **and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class.** They contain many manifestations of a continuing purpose **to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce.**"

Further:

"These considerations persuade us that the par-

agraphs in question should be interpreted and read as **not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."**

This notable opinion stands today as the law of the Court. No subsequent decision has in the least qualified it. What it says, is as true now, as when originally declared. It charted the authority the Interstate Commerce Commission may exercise, and that which it may not exercise, under the Transportation Act, soon after the passage of the Act. It definitely holds that **the Commission has no authority to deal with the intrastate traffic, or with the abandonment of the facilities whereby that traffic may be carried on,** of a railroad carrier, though engaged also in the carrying of interstate traffic, independently owned and not a part of another line, any shortage in whose earnings will not burden or affect interstate and foreign commerce and which no carrier in such commerce will have to bear or make good. It affirms that the continued operation solely in intrastate commerce of such a carrier **cannot be of more than local concern.**

In principle, there can be no difference between the authority or lack of authority of the Commission to deal with the abandonment of such a carrier's railroad track for interstate purposes, and its authority or lack of authority to deal with the construction of such a carrier's railroad track for such purposes.

As related to intrastate commerce, and the facilities for carrying such commerce, the Commission has gained no additional powers since that decision was rendered. Its authority over that commerce and those facilities is limited now, as it was then, by the Constitution; and, as announced by repeated decisions of this Court, is restricted to the prevention of results prejudicial to interstate and foreign commerce. It is not an absolute power. It is purely a qualified power, one incident, merely, to its authority to regulate interstate and foreign commerce, and to be exercised only in a proper regulation of that commerce.

Invoking Texas vs. Eastern Texas Railroad Company as the determinative authority in this case, it is, we maintain, perfectly idle to say that the mere naked **construction** of this five mile railroad, located wholly within the State, independently owned, and not a part, branch, or extension of another rail-

road, will or can prejudice interstate and foreign commerce.

Neither will its intrastate operation, when it comes to be operated, under the rule of the decision in Texas vs. Eastern Texas Railroad Company.

But with its operation, we are not here concerned. The question is as to its right to build and have a railroad track.

Our proposition is that since the State of Texas, as a sovereignty, undoubtedly possessed the power to charter the railroad, the railroad equally has the undoubted power to do that which will make effective the grant of authority given by the State, that is, provided the facility, namely, a railroad track, for the doing of intrastate business, independently, altogether, of whether it operates or does not operate in interstate and foreign commerce.

On this question, District Judge West, in his opinion in Smyth vs. Asphalt Belt Railway Company, 292 Federal Reporter, at page 878, said:

> "The A. B. Company, because of its incorporation under the general laws of the state of Texas applying to railroads, has the right to construct, maintain and operate a railroad wholly within the State of Texas. Obviously it has the right

under such laws to condemn private property for public use as an intrastate common carrier, whether it intended to, or afterwards did engage in interstate commerce or not."

The lawfulness of the authority of the State of Texas to grant Respondent a charter to be a railroad company for intrastate purposes and to construct a railroad line wholly within the State, is not to be questioned. The issuance by the State of the charter is of the very essence of its sovereignty, not a qualified sovereignty, but a sovereignty absolute.

Is that charter simply a parchment? Does it confer no right? May no powers be exerted under it? Was its issuance a vain and empty thing? If so, the State's power to issue it, is equally vain and impotent. If no powers may be exercised under the charter, we come at once to the proposition that there was no rightful authority in the State to issue it. To say that the privilege of exercising the rightful powers conferred by the charter is limited and may exist only through the consent of another sovereignty, is but to say that the authority to confer those powers is equally so limited.

That means the State has no free power to charter a purely intrastate railroad.

But the State unquestionably has that power and may freely exercise it. No Federal consent is required for it to do so.

It is an axiom of the law that wherever a power is rightfully granted, all things may be done which are necessary and appropriate to carry the power into execution.

A railroad company so chartered, as is this Respondent, by the State, has the clear right to do an intrastate business under purely State authority. And as a part of that right, necessary to its rightful exercise, it has the power to build its track whereby it may be enabled to enter upon that character of business.

With no power in the Congress to regulate intrastate commerce at all except as purely incidental to the exercise of its authority over interstate commerce, and, then, only to prevent its becoming a burden upon interstate commerce, it is a strange anomaly to urge that an advance of there even being any intrastate business of a railroad to regulate, before it is, or can be, known whether that business will in any wise affect interstate commerce,

when it is a matter of mere vague and fanciful speculation as to its producing any effect upon that commerce, yet, despite all this, the Congress through the Interstate Commerce Commission has the authority in advance to determine whether the railroad, under the charter of a sovereign State, may for purely intrastate purposes even have a track upon which to operate.

We respectfully submit that the proposition will not stand. It is in the face of the undoubted right of the State to charter a railroad and make its charter effective for the railroad's intrastate purposes. It substitutes the power of Congress for the power of the State, in contravention of the Constitution. It means, and can only mean, that Congress has the power, generally, to regulate intrastate commerce, regardless of whether that commerce burdens or affects interstate commerce or not. It affirms that Congress has the authority to prevent the existence of a railroad for purely intrastate purposes, though lawfully chartered by the State, by denying it the means whereby it may exist. It is a doctrine which in our opinion destroys the reserved powers of the States.

With the intrastate business of a railroad wholly

exempt from any power of Congress, except as and when it becomes a burden upon interstate commerce, we repeat that consistently with that doctrine of the Constitution there can be no power in Congress to prevent, in advance, the entering by the railroad upon intrastate business by wholly denying it the means whereby it may be conducted.

The mere provision of the facilities for such a railroad as is here involved, is of no Federal concern.

Only as the result of its **operation**, in any event, could interstate or foreign commerce be affected.

It is impossible for its mere **construction** as an independent line, unrelated to any interstate line or carrier, to have any effect upon that commerce.

And its **construction** is, therefore, necessarily exempt from any Federal control.

This, it seems to us, must be true, unless it is to be asserted that Congress has a broad and general control over all railroads and all building of railroads.

But that doctrine is emphatically denied by this Court's opinion in Texas vs. Eastern Texas Railroad Company. It was equally denied in the First Employers' Liability Cases, 207 U. S. 463.

In the latter case, it was urged in the Attorney General's brief that it was the **carrier** and not its employees which the Act under review sought to regulate, and that the **carrier** was subject to the regulation because it was engaged in interstate commerce. The Court repudiated the proposition in an emphatic opinion, and held the Act invalid because it did not restrict the liability sought to be imposed to injuries received while the employee was engaged **in operations** of the carrier **in interstate commerce.**

If, as held in Texas vs. Eastern Texas Railroad Company, the railroad there was entitled **to maintain** a track for intrastate purposes, why is not this railroad as fully entitled **to build** a track for intrastate purposes, where the building of the track here, as was true of the operation of the railroad there, cannot possibly impose any burden upon interstate commerce?

We respectfully submit that the Respondent was entitled to build its track across the Petitioner's land, and that the consent of the Interstate Commerce Commission was not required.

We pray that the writ of certiorari be dismissed, or if that be not done that the decree of the Circuit Court of Appeals affirming that of the District Court, be affirmed.

W. W. MOORE,
J. Y. POWELL,
NELSON PHILLIPS,
Solicitors for Respondent.

PHILLIPS, TOWNSEND & PHILLIPS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 231.—October Term, 1927.

Texas & New Orleans Railroad Co., Petitioner, *vs.* The Northside Belt Railway Co.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 9, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

Under the laws of Texas, Cullinan secured a charter for the Northside Belt Railway Company with power to build and operate, as a common carrier, a terminal railway from a private plant to another local railroad. The line was to be about five miles long and wholly within that State. The Northside Company instituted proceedings in a Texas court to acquire by condemnation a right of way, for a short distance, over unused land owned by the Texas & New Orleans Railroad Company, an interstate carrier. Thereupon, the latter brought, under paragraphs 18 to 22 of § 1 of the Act to Regulate Commerce as amended by Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 477-478, this suit in the federal court for southern Texas. The prayer was to enjoin the Northside Company from continuing the condemnation proceedings and also from constructing, maintaining or operating the railroad over the plaintiff's land. This relief was sought solely on the ground that the defendant had not obtained from the Interstate Commerce Commission the certificate of public convenience and necessity prescribed in those paragraphs of the Transportation Act.

A restraining order applied for upon the filing of the bill was denied. No application was made for an interlocutory injunction. The defendant answered that it was exclusively an intrastate carrier and as such was not subject to the Interstate Commerce Act. The case was fully heard on the merits by the District Court. It appeared that, before this suit was begun, judgment had been entered in the condemnation proceedings; that the amount of the compensation awarded had been paid into court (as provided by

the law of the State); and that the Northside Company had entered into possession of the premises taken. It appeared that, before process was served upon the defendant, the line had been constructed over the strip of land in question. And it also appeared that, at the time of the hearing, the line had not yet been completed; that the defendant had not engaged or offered to engage in interstate commerce; and that it could not possibly engage in such commerce until the completion of its line.

The District Court found and held that the Northside Company was an intrastate carrier only; that its construction would not burden interstate commerce directly or indirectly; and that paragraphs 18 to 22 were not applicable to the construction of an intrastate railroad not yet engaging in interstate commerce. On that ground, the trial court denied the injunction and ordered the bill dismissed without prejudice to the right of the plaintiff "to hereafter apply for an injunction against the respondent if its activities in the future shall bring it properly within the purview" of those paragraphs. 8 F. (2d) 153.

The Circuit Court of Appeals affirmed the decree of the District Court, without passing upon the merits of the case. It held that the cause had become moot, because "the only relief prayed for was action by the court restraining the doing of things which have been done since the suit was brought." This conclusion was based on its own finding that "before the decree appealed from was entered, a judgment condemning said land was rendered in said condemnation suit, and appellee had constructed its railroad over said land and was operating the same." 16 F. (2d) 782. This Court granted a writ of certiorari. 274 U. S. 734.

The finding of fact upon which the Court of Appeals rested its judgment was clearly erroneous. There is no basis in the record for the finding that the railroad was in operation. The part of the railroad over the plaintiff's land had been constructed; but the railroad had not been completed. No part of it had been operated; and apparently it was physically impossible to operate it in interstate commerce until completed. Paragraph 20 of § 402 specifically provides that unauthorized operation as well as construction may be enjoined. Moreover, the facts erroneously found would not, if true, have rendered the case moot. For where a defendant, with notice of the filing of a bill for an injunction, proceeds to complete the acts sought to be enjoined, the court may, by

mandatory injunction, compel a restoration of the status quo. *Tucker* v. *Howard,* 128 Mass. 361, 363; *Town of Platteville* v. *Galena & Southern Wisconsin R. R. Co.,* 43 Wis. 493, 506-507.

The decree of the District Court was, however, properly affirmed for the reason indicated by that court. The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *The Chicago Junction Case,* 264 U. S. 258; *Railroad Commission of California* v. *Southern Pacific Co.,* 264 U. S. 331; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.,* 271 U. S. 244. Compare *Colorado* v. *United States,* 271 U. S. 153. The mere fact that a railroad lies wholly within one State and is to be built by an independent corporation, does not, of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs.[1] But Congress did not

[1]In the following cases the Interstate Commerce Commission has granted or denied certificates of convenience and necessity for the construction and operation of a new line, built by a corporation not theretofore a carrier subject to the Interstate Commerce Act, and lying wholly within the limits of one state: Application of Michigan Northern R. R. Co., 65 I. C. C. 480, 72 I. C. C. 21; Application of Coon Bayou & Arkansas City Ry. Co., 65 I. C. C. 701; Application of Uvalde & Northern Ry. Co., 67 I. C. C. 204, 554; Application of Golden Belt R. R., 67 I. C. C. 370, 70 I. C. C. 73, 71 I. C. C. 233, 99 I. C. C. 135; Application of Detroit & Ironton R. R. Co., 67 I. C. C. 600; Application of Flint Belt R. R. Co., 70 I. C. C. 292; Application of New Holland, Higginsport & Mount Vernon R. R. Co., 71 I. C. C. 119; Application of Kansas & Oklahoma Southern Ry. Co., 71 I. C. C. 130, 90 I. C. C. 349, 553; Application of Mingo Valley R. R. Co., 71 I. C. C. 139, 82 I. C. C. 797; Application of Osage Ry. Co., 71 I. C. C. 160; Application of National Line R. R. Co., 71 I. C. C. 556; Application of Shreveport & Northeastern Ry. Co., 71 I. C. C. 586; Construction of Line by Eastern Maine, 72 I. C. C. 39; Construction by Nashville & Atlantic R. R., 72 I. C. C. 655; Construction of Line by Carbon County Ry., 76 I. C. C. 485; Construction of Line by Pacific Southwestern R. R., 76 I. C. C. 488; Construction of Line by Utah Central R. R., 76 I. C. C. 737; Construction of Line by Jefferson Southwestern, 76 I. C. C. 778, 86 I. C. C. 796, 90 I. C. C. 512, 94 I. C. C. 656, 111 I. C. C. 105, 124 I. C. C. 649; Construction of Line by Longview, Portland & Northern, 79 I. C. C. 805, 90

in terms prohibit wholly intrastate carriers from building lines to be used wholly in intrastate commerce. As long as the Northside Company confines its operations to intrastate commerce, it will not violate the federal law. Compare *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204; *Railroad Commission of Texas* v. *Eastern Texas R. R. Co.*, 264 U. S. 79.

The plaintiff admits that operation of the Northside line has not begun. But it insists that under the laws of Texas every common carrier not only may, but must, if requested, engage also in interstate business, and it argues that this makes the Northside Com-

I. C. C. 303; Construction of Line by American Niagara R. R., 82 I. C. C. 420; Construction of Line by Kansas & Missouri Ry. & Terminal Co., 82 I. C. C. 612; Construction and Operation by Arkansas Short Line, 82 I. C. C. 651; Construction of Line by Mississippian Ry., 82 I. C. C. 698; Construction of Line by Wenatchee Southern Ry. Co., 90 I. C. C. 237, 94 I. C. C. 673, 99 I. C. C. 349, 105 I. C. C 347; Construction of Line by Rio Grande City Ry. Co., 90 I. C. C. 583, 94 I. C. C. 323, 655; Proposed Construction by Nueces Valley, Rio Grande & Gulf R. R. Co., 90 I. C. C. 616; Proposed Construction by Rio Grande City & Northern Ry., 90 I. C. C. 689; Proposed Construction and Acquisition by Morgantown & Wheeling R. R. Co., 94 I. C. C. 372; Proposed Construction of Line by Colorado, Columbus & Mexican R. R., 94 I. C. C. 676; Construction of Line by Quebec Extension Ry. Co., 99 I. C. C. 93, 189, 111 I. C. C. 621; Construction of Line by Graham County R. R. Co., 99 I. C. C. 264; Construction and Operation of Los Angeles Junction Ry., 99 I. C. C. 287, 111 I. C. C. 433, 124 I. C. C. 703; Construction of Line by National Coal Ry. Co., 99 I. C. C. 569; Construction of Line by Mississippi & Schoona Valley R. R. Co., 99 I. C. C. 606; Construction of Line by Oklahoma & Rich Mountain R. R. Co., 105 I. C. C. 559; Proposed Construction by Detroit Connecting R. R., 105 I. C. C. 657; Proposed Construction by Detroit Grand Belt R. R. Co., 105 I. C. C. 669; Construction of Line of Railroad by State of Alabama, 105 I. C. C. 673; Construction of Line by West Pittston-Exeter R. R., 111 I. C. C. 626, 117 I. C. C. 315; Construction of Line by Northern Oklahoma Rys., 111 I. C. C. 765; Construction of Line by Lowell & Southern R. R. Co., 117 I. C. C. 1; Construction of Line by Rio Grande, Micolithic & Northern Ry., 117 I. C. C. 19; Construction of Line by Southern Kansas Industrial Belt Ry. Co., 117 I. C. C. 210; Proposed Construction of Line by Perry & Southeastern Ry., 124 I. C. C. 341. In Construction of Line by Grand Prairie & Northern R. R., 76 I. C. C. 437, the Commission dismissed an application by a wholly intrastate line intending to engage exclusively in intrastate business. In Construction of Line by Jefferson Southwestern, 86 I. C. C. 796, 799, the Commission said that the fact that a proposed line of railroad was already in part constructed for use in intrastate commerce could have no bearing on its decision with regard to granting or denying a certificate. "So far as interstate commerce is concerned, the proposed line does not exist."

pany subject to the Interstate Commerce Act. Texas Rev. Stat. 1925, Art. 6407. Obviously, the law of Texas could not require the Northside Company to engage in interstate commerce, if by doing so it violated any law of the United States. Compare *Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co.* v. *United States,* 275 U. S. —. Here, there was as yet no threat to use the line in interstate commerce; and it was shown that the line could not possibly be so used until completed. There was clearly no imminent danger that irreparable injury would result from its mere construction. Under these circumstances, to deny the injunction and dismiss the bill without prejudice, was, at least, a permissible exercise of the court's discretion.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.